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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 823.

ANTHONY FARRUGIA, PLAINTIFF IN ERROR,

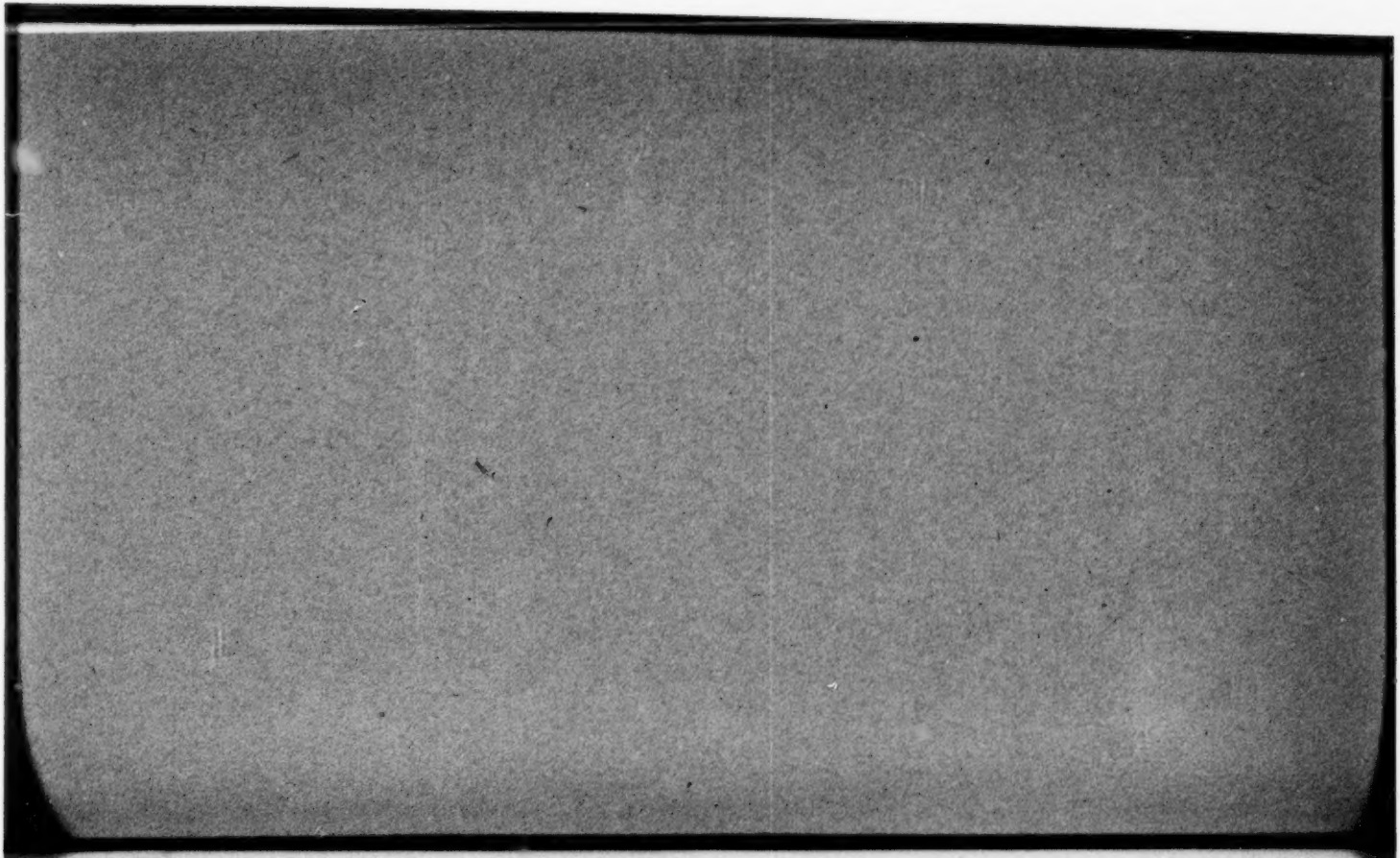
vs.

PHILADELPHIA AND READING RAILWAY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED DECEMBER 22, 1913.

(23,974)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1913.

1 Docket 1210, October Session, 1910.

ANTHONY FARRUGIA
vs.
PHILADELPHIA & READING RAILWAY COMPANY.

George Demming.
Wm. Clarke Mason.

Trespass.

1910, December	10.	Praecipe for Summons filed.
		Summons exit returnable the first Monday of January next.
		Statement of Claim filed.
		Rule to Plead filed.
	28.	Order for the appearance of Wm. Clarke Mason, Esquire for defendant filed.
1911, January	3.	Summons returned "served" and filed.
March	2.	Plea filed.
	3.	Order to place case on trial list filed.
April	27.	Rule to show cause why plaintiff should not be allowed to amend his statement of claim filed.
June	7.	Rule to amend statement submitted on briefs.
September	20.	Opinion, Holland, J., sustaining defendant's objection to plaintiff's rule to amend statement filed.
1912, August	30.	Order to place case on trial list filed.
September	4.	Reentry of rule to show cause why plaintiff should not be allowed to amend his statement of claim filed.
		Order to place case on argument list sur rule to amend statement of claim filed.
	6.	Answer to rule to amend statement of claim.
	11.	Replication to answer to rule to amend statement of claim.
	30.	Argued sur motion to amend statement of claim.
October	3.	Opinion, Thompson, J., making absolute rule to amend statement filed.
	4.	Amendment to statement of claim filed.
	7.	Defendant's exception to order making absolute rule to amend statement of claim filed.

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1912, October	7.	Order allowing exception to defendant to order making absolute rule to amend statement of claim filed.

1913, March 3. Order to place case on trial list filed.
August 19, Order to place case on trial list filed.
November 19. Jury called.
20. The Court directs judgment of non-suit.
21. Motion to take off judgment of non-suit filed.
Defendant's Bill of Costs filed.
22. Plaintiff's Bill of Costs filed.
28. Order refusing motion to take off non-suit filed.
Bill of Exceptions filed.
Order allowing exception to refusal to take off non-suit filed.
Certificate as to question of jurisdiction filed.
December 4. Praecipe for judgment filed. Judgment accordingly.
Judgment filed.
12. Assignments of Error filed.
12. Petition for Writ of Error to U. S. Supreme Court filed.
Order allowing writ of error to U. S. Supreme Court filed.
13. Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
13. Bond sur writ of error to U. S. Supreme Court in $250.00 and order of approval filed.
13. Citation allowed and issued.
15. Citation returned "service accepted" and filed.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judge of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you between Anthony Farrugia, Plaintiff, and Philadelphia and Reading Railway Company, Defendant, a manifest error hath happened, to the great damage of the said Anthony Farrugia as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the City of Washington, D. C., within thirty days, in the said United States Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, at Philadelphia, the 13th day of December in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the District Court of the United States, E. D. Penna.]

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before Thompson, J.

Allowed
BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

4 United States Circuit Court, Eastern District of Pennsylvania, October Sessions, 1910.

No. 1210.

ANTHONY FARRUGIA, a Citizen of the State of New Jersey,
vs.
PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania.

Plaintiff's Statement of Claim.

(Filed December 10, 1910.)

Anthony Farrugia, the plaintiff, a citizen of the State of New Jersey, claims of the Philadelphia and Reading Railway Company, the defendant, a corporation of the State of Pennsylvania, the sum of Twenty-five Thousand Dollars ($25,000.00) as damages, upon the cause of action, of which the following is a statement.

Said defendant Company is a common carrier, railroad corporation, and as such is engaged in the business of transportation for hire, both of passengers and of freight and merchandise, and is engaged in commerce between several of the States of the United States of America, and in Foreign commerce as well as Interstate.

On and about the 12th day of August, 1909, said plaintiff was employed by said defendant Company as a laborer or a laborer's boss in, on and about a gravel or dirt train, belonging to and controlled and operated by defendant in and near the Borough of South Bethlehem, Pennsylvania. While so employed, and while engaged in the proper and careful performance of his duties, through the negligence solely of said defendant Company, he was put to work in such an unreasonably dangerous place, and said defendant Company so utterly failed to warn and instruct him with regard to the dangers of said place, which otherwise he did not know, and said defendant

Company so negligently constructed, maintained and con-
5 ducted its appliances, track, roadbed, and equipment, that he came into violent contact with an obstruction or pole, standing and placed by said defendant Company, improperly and carelessly, in too close proximity to the track, whereby he was precipitated under said train and run over, sustaining frightful and permanent injuries, being maimed and incapacitated for life, rendered unable to earn his livelihood, caused great pain, distress and suffering, and put to great trouble, inconvenience and expense, all to his damage in the amount as above stated.

Wherefore this suit.

GEORGE DEMMING,
Attorney pro Plaintiff.

Endorsed: Sir: Enter rule on defendant to plead within fifteen days, or judgment sec. leg. George Demming, Att'y pro Pl'ff. Dec. 10, 1910.

6 United States Circuit Court, Eastern District of Penna., October Sessions, 1910.

No. 1210.

ANTHONY FARRUGIA
vs.
PHILADELPHIA AND READING RAILWAY COMPANY.

Amendment to Plaintiff's Statement of Claim.

(Filed October 4, 1912.)

And now, this, the 4th day of October, 1912, in accordance with the decision and determination of the Court as rendered and filed yesterday, the 3rd inst., Plaintiff, through his counsel, hereby amends and adds to his original statement of claim filed in this case as of the above term and number, the same to be interpolated and considered as being the second paragraph of the statement of claim as originally filed in the suit, so that the following words will be read into and considered and understood to be the second paragraph thereof the same as originally filed therewith:

The plaintiff, Anthony Farrugia, brings this action under the provisions of, and by reason of the cause of action given by, the Acts of Congress known as an Act relating to the liability of common carriers by railroads to their employees in certain cases, approved April 22, 1908, and its Amendment of April 5, 1910. And at the time of the occurrence, grievance and accident hereinafter set forth and complained of by plaintiff, said defendant was engaged, under the meaning and application of said Acts of Congress, in interstate and foreign commerce, and plaintiff, likewise, as defendant's servant

and employee, was engaged similarly in interstate and foreign commerce.

GEORGE DEMMING,
Attorney pro Plaintiff.

7 U. S. Circuit Court, October Term, 1910.

No. 1210.

ANTHONY FARRUGIA
vs.
RAILWAY CO.

(Plea: Filed March 2, 1911.)

Defendant pleads—Not Guilty.

WM. CLARKE MASON,
Attorney for Defendant.

8 In the District Court of the United States, Succeeding the Circuit Court of the United States, Eastern District of Pennsylvania, of October Term, 1910.

No. 1210.

ANTHONY FARRUGIA
vs.
PHILADELPHIA AND READING RAILWAY COMPANY.

(Endorsed: Bill of Exceptions; Approved. Wm. Clarke Mason. Filed November 28, 1913.)

Be it remembered, That in the said Term of October, 1910, came the said Plaintiff into the said court, and impleaded the said defendant in a certain plea of trespass &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the county aforesaid before the Honorable J. Whitaker Thompson, Judge of the said Court, the nineteenth day of November, 1913, the aforesaid issue between the said parties came to be tried by a jury of the said county for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff offered evidence as particularly set forth in the follow-

ing transcribed stenographic notes of testimony, and at the close thereof the learned trial judge directed the entering of a non-suit on the ground that plaintiff was not engaged in interstate commerce at the time of the happening of the occurrence complained of, also as hereinafter set forth:

9 In the District Court of the United States for the Eastern District of Pennsylvania.

No. 1210.

FARRUGIA
vs.
PHILADELPHIA & READING RAILWAY COMPANY.

Before Hon. J. Whitaker Thompson, J., and a Jury.

PHILADELPHIA, PA., WEDNESDAY, *November* 19, 1913.

Present:

George Demming, Esq., representing the Plaintiff.
William Clarke Mason, Esq., representing the Defendant.

Before the jury was sworn in this case, counsel for the defendant requested the Court to direct that before the Court allow the jury to be sworn to try the case, the plaintiff be required to pay the costs of the common law action for the same accident, in which action a non-suit was entered against the plaintiff as of October Ses-
10 sions, 1910, No. 1208.

(Objected to by counsel for the Plaintiff on the ground, first, when the common law action was brought and the action under the Federal Statute was brought against the defendant, there was no intention of harrassing the defendant with a multitude of suits, but the two actions were simply brought because the plaintiff did not know under which action his remedy lay, and, second, because, although the parties are the same, the causes of action in the two suits are different, and, third, because it would be an undue burden to the plaintiff to ask him to pay the costs of the common law action at the present time, before he has obtained a judgment in the present case, and no attempt has been made to collect in any other way than the present motion the costs of the former common law action.)

After argument the Court directed that the Plaintiff pay the costs, amounting to one hundred and five dollars, in the common law action, and counsel for plaintiff agreed to pay the costs.

(Exception noted for Plaintiff to the direction of the Court to pay the costs, by direction of the Court.)

Jury Sworn.

11 *Transcript of Testimony, Charge of the Court, Rulings of the Court, and Exceptions.*

Mr. DEMMING: I have one witness here, who is a very busy man, from Easton, in order to prove part of the question of inter-state commerce involved in this case, and if your Honor will permit me, I would like to call him out of the regular order, and dispose of the question of inter-state commerce first.

The COURT: You can use your own judgment as to the order in which you call your witnesses.

Mr. DEMMING: In the first place, in order to save time and the convenience of certain officials of the Philadelphia and Reading Railway Company, who were subpœnaed and who were about to be subpœnaed by the Plaintiff in this case, counsel for Defendant and Counsel for Plaintiff have agreed to the following stipulations as covering part of the question of inter-state commerce involved in the present case, which I will now read.

Mr. MASON: There was some consideration for the Court, too, in that stipulation, so that we would not take two days to
12 prove the facts that we have agreed upon.

Mr. DEMMING: The stipulation is as to the admission of certain testimony, without formal proof, and reads as follows:

"In re ANTHONY FARRUGIA
vs.
PHILA. & READING RAILWAY COMPANY.

Stipulation as to the Admission of Certain Testimony Without Formal Proof.

In order to save the time and prevent the inconvenience of certain officials, clerks and employees of the Philadelphia and Reading Railway Company, it is hereby formally agreed between counsel that the following facts may be admitted at the trial of the above case without formal proof of the same being made:

That the Plaintiff was employed by the Phila. and Reading Railway Company, and was employed by them as foreman of a gang of laborers engaged at the time of the accident in removing dirt, placing the same upon open cars at one point, and, after the cars had been removed, drawn and shifted, taking the same from said cars at another point. That the accident to plaintiff occurred on August 12, 1909, and that this dirt was being removed from the property of the Phila. and Reading Railway Company, had been in process of being so removed for some time prior to said date, and was being so removed as a necessary part of the excavation, leveling and widening of ground for the construction of additional tracks,
13 sidings and switches of the railroad yard of the said Phila. and Reading Railway Company, located at South Bethlehem, Pa. That the necessary excavation was finished, and the laying of said additional tracks, sidings and switches was begun on November

9th, 1911, and the whole addition to said yard was completed on December 31, 1912.

That this addition to the said railroad yard was planned for the purpose of enlarging the capacity of said yard for the increased business offered to the Phila. and Reading Railway Company at South Bethlehem, both by the Bethlehem Steel Company located at said town as well as by other industries in the vicinity. That the Phila. and Reading Railway Company is engaged in foreign and interstate commerce, as well as intra state commerce, and was so engaged at the time of said accident. That the cars handled by the said Phila. and Reading Railway Company on the tracks of the old yard before the work of enlarging said yard was begun and before said accident occurred, during the time of the work of enlarging said yard and at the time of the happening of said accident, and the cars handled in said yard since the completion of its said enlargement on December 31st, 1912, have been cars hauling, carrying, bearing and engaged in both interstate and intrastate commerce.

That the dirt upon the cars of the train upon which plain-
14 tiff was engaged at the time of the accident was subsequently unloaded upon the property of the Thomas Iron Company, at Hellertown, Pennsylvania, which is a suburb of South Bethlehem, said dirt being so unloaded because of a request so to do made by the said Thomas Iron Company to the said Phila. and Reading Railway Company. Said Property of the Thomas Iron Company was adjacent to and connected with the property of the Phila. and Reading Railway Company; and said dirt was so unloaded for the purpose of building and affording additional roadbed and right of way for the construction and extension of sidings and side tracks by the said Thomas Iron Company upon its said adjacent property. These said sidings and side tracks are directly connected with the main tracks of the Phila. and Reading Railway Company, from which main tracks all of the trains and cars of the said Thomas Iron Company run and are propelled onto the said sidings and tracks of the said Thomas Iron Company, carrying the commerce of the said Thomas Iron Company.

The cars upon which said dirt was loaded at the time of the accident, and from which cars said dirt was subsequently removed, as described, and the engines pulling and propelling said cars, were owned, controlled and furnished said plaintiff and his gang of men by the Phila. and Reading Railway Company.

GEO. DEMMING,
Counsel for Plaintiff.

15 WM. CLARKE MASON,
Counsel for Defendant."

Mr. MASON: The statements contained in that stipulation are all admitted as fact. They are objected to as irrelevant, because the statement of claim and the amendment to the statement of claim do not cover the fact of engagement in interstate commerce at the time of the accident. I am making this objection simply as a mat-

ter for the record, to be considered hereafter. You will remember on the discussion of the question when the amendment was offered, my objection was, as there was no averment that the plaintiff was doing anything at the time which could be regarded as interstate commerce, the mere conclusion of law did not cure the original statement. That is my contention.

The COURT: The objection is overruled.

(Exception noted for defendant, by direction of the court.)

CHARLES W. LAUDENBERGER, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Easton.

Q. What is your business?

A. Real estate agent.

Q. What was your business in August 1909?

16 A. At that time I was connected with the Thomas Iron Company. I had charge of the office.

Q. You had charge of the office?

A. Yes.

Q. And the office was where?

A. The office was on the east side of the Philadelphia & Reading Railway.

Q. Near what station?

A. Near Hellertown.

Q. Hellertown station?

A. Yes.

Q. Were you familiar in the position you then occupied with the shipments both to and from the Thomas Iron Company?

A. Yes, sir.

Q. What class of shipments did they receive?

Mr. MASON: That is objected to as totally immaterial.

The COURT: What is your objection?

Mr. MASON: It is totally immaterial, what the Thomas Iron Company received, when they received it or where they received it. We are dealing with the employment for the Philadelphia & Rading Railway Company, and it is admitted that they were engaged both in interstate and intrastate commerce at this time. The only question that is at all material concerning the inter state commerce employment of this plaintiff is whether the work

17 he was doing for the company was work in interstate commerce. The Thomas Iron Company does not enter into it one way or the other.

The COURT: As I understand it, there was a siding being built in connection with the Thomas Iron Company's plant?

Mr. DEMMING: The dirt was dumped there for that purpose.

The COURT: I take it that Mr. Demming is endeavoring to show that that siding was to be used in inter state commerce. Is that it?

Mr. DEMMING: Exactly, yes.

The COURT: I will overrule the objection.

Mr. MASON: I imagine your Honor will take the same course, but I want to call your attention to the stipulation, which I think covered this whole question.

Mr. DEMMING: I asked you whether you would admit the question of interstate commerce, and you told me to bring my witnesses here.

Mr. MASON: Then, covering all the material questions involved in this case. The averment here is that it was so unloaded for the purpose of building and affording an additional road bed and right of way for the construction and extension of sidings and side tracks by the said Thomas Iron Company upon its said adjacent property.

So that what the Thomas Iron Company did or did not do,
18 my thought is, is immaterial.

The COURT: I will admit it for the present.

(Exception noted for defendant, by direction of the court.)

By Mr. DEMMING:

Q. You say you are?

A. Yes, sir.

Q. What shipments did the Thomas Iron Company receive over its sidings and switches?

Mr. MASON: That is objected to.

By Mr. DEMMING:

Q. Connected at this point at Hellertown station.

A. What materials?

Q. What shipments did they receive from other points?

Mr. MASON: That is objected to, because it is not a question that the witness can testify to from memory.

The COURT: Why don't you ask him the question on which the objection was based, and on which I passed? That question was, "What class of shipments did they receive."

By Mr. DEMMING:

Q. Where were the shipments from?

The COURT: You have not got an answer to the question "What class of shipments did they receive"?

By Mr. DEMMING:

Q. What class of shipments did they receive?

A. Well, they received magnatite ore, they received limestone, they received coke, and they received coal.

19 Q. Taking those shipments in order, where was the ore from?

Mr. MASON: That is objected to, because the records of the car ladings will show where it was from. This witness cannot testify from memory as to that fact.

Mr. DEMMING: If he knows, why not?

The COURT: Of course he can. I do not see why he cannot.

By the COURT:

Q. Were you in charge of the shipments that came in?

A. I was in charge of entering the bills of lading from the different destinations where these different materials were shipped from.

Mr. MASON: I cannot cross examine him on his memory, but I can cross examine him on the bills of lading. I am entitled to have the bills of lading here. They may or may not corroborate his recollection back in 1909.

The COURT: Who would know better about the particular commerce that this iron company engaged in than the chief clerk?

Mr. MASON: Probably no one, but human recollection, my own experience justifies me in saying, is too intangible and uncertain a thing, when it comes to fixing the contents of a bill of lading five years ago.

By Mr. DEMMING:

Q. Did you get this ore regularly from a certain place?

20 A. Yes.

Q. How regularly would you get it?

A. A daily occurrence.

Q. A daily occurrence?

A. Yes.

Q. Always from the same place?

A. Yes, sir.

Q. During the entire time you were there?

A. Yes, sir.

Q. What was that place?

Mr. MASON: That is objected to.

The COURT: The objection is overruled.

(Exception noted for defendant, by direction of the Court.)

A. Wharton, New Jersey.

Q. With reference to the track directly in front of the Hellertown Station——

Mr. MASON: That is too indefinite, because they are all in front of the Hellertown station.

Mr. DEMMING: Wait until I finish the question.

By Mr. DEMMING:

Q. With reference to the track directly in front of the Hellertown Station, belonging to the Thomas Iron Company, did or did not these cars containing ore ever stand or were they stationed upon that track?

Mr. MASON: That is objected to from this witness. He was in charge of the office.

21 By the COURT:

Q. Did you see the cars?

A. I could not help seeing them.

The COURT: Then he can testify as to what he saw, if he saw the cars of ore.

Mr. MASON: I do not want to be captious in my objections.

The COURT: Do you mean to say that a man cannot testify to a thing merely because it did not come under his official duties?

Mr. MASON: No, sir.

The COURT: What is your contention?

Mr. MASON: My contention was, before that question was answered—your Honor has cured part of the objection by fixing him at a place where he could see these cars. That eliminated that part of the objection. I do object to the office manager testifying what was going on outside of the office at a point which is some distance away. Now I would like to fix the time a little bit more definitely before we regard this question as material.

The COURT: Perhaps if the witness is given an opportunity he can tell the time.

(Mr. Demming produces five photographs, which are marked "Exhibits A., B., C., D., and E.," respectively.)

By Mr. DEMMING:

Q. I show you photograph marked "B" and ask you what track is represented on the left-hand side of that picture?

22 A. You mean on the left hand side of the Philadelphia and Reading Railway Company?

Q. On the left hand side of that picture.

A. That is the Thomas Iron Company's siding.

Q. Connected with the Philadelphia & Reading Railway Company at this point?

A. Yes, sir.

Q. I show you photograph marked "E" and ask you what track is represented there, on the central right-hand portion of that picture?

A. The Thomas Iron Company's track.

Q. I show you photograph marked "C" and ask you what track is shown on the left hand side of that picture?

A. The Thomas Iron Company's track.

Q. I show you photograph marked "D," and ask you what track that is with the engine and cars standing on?

A. That is the Thomas Iron Company's track.

Q. I do not want to use the points of the compass, because we will get mixed on that. What was on the other side of the Hellertown station, on the opposite side of the Hellertown Station, from the Thomas Iron Company's works?

A. You mean on the west side of the station.

Q. That depends on what you call the west side of the station.

A. I call the station on the east side of the Philadelphia & Reading Railway Company.

Q. That is the east side?

23 A. Yes.

Q. Then the Thomas Iron Company's plant is on the west side?

A. Yes.

Q. A little north of the station?
A. Yes, sir. Yes, northwest.
Q. What was there on the west side of the Philadelphia & Reading Railway Company's tracks south of the station?
A. The Thomas Iron Company's track.
Q. Where did that track run?
A. It ran over to the quarry.
Q. To the quarries?
A. Yes.
Q. Where you got your limestone for the Iron Company?
A. Yes, sir.
Q. What had you down near the quarries?
A. Well, at one time there was this magnatite ore unloaded there?
Q. That was the storehouse of the magnatite ore?
A. For some of it, yes, sir.
Q. And that was the ore that came from New Jersey, as you have mentioned?
A. Yes.
Q. The cars carrying that ore down to this storehouse for the ore would go down which track?

Mr. MASON: That is objected to. In the first place, we don't know whether it is at the time of the accident or after it, or
24 before it. I would like to know. If he will fix the dates, I may have a further objection.

Mr. DEMMING: I do not think we are confined to that particular time.

By Mr. DEMMING:

Q. After the time of the accident? About August 1909? At that time, was it?
A. Before that time the ore was unloaded there.
Q. Was it there at that time? About that time also?
A. Yes, sir, some of it.
Q. Some of it?
A. Yes.
Q. The cars carrying that ore would go down over what track?
A. First they would go down, come in on the Philadelphia & Reading Railway Company siding, then they would go down over the Thomas Iron Company's track.
Q. That is the track you have just pointed out on these pictures, on the four photographs?
A. Yes, sir.
Q. And in order to get down to that storehouse or storage place for the ore they would have to pass down in front of the Hellertown Station?
A. Positively.
Q. About how far south of the station was that place?
A. Well, not very far. I could not just say how many feet. Not very far from there.

25 Q. Several hundred feet, was it?
A. Yes. It might be possibly 150 or 200 feet, something in that neighborhood. I could not exactly tell that. It might be more or less.

Cross-examined.

By Mr. MASON:

Q. When did you leave the Thomas Iron Company?
A. I left the Thomas Iron Company on the last day of September, 1909.
Q. 1909?
A. Yes.

By the COURT:

Q. How long had you been with them?
A. I worked twenty-nine years with them off and on.

Redirect examination.

By Mr. DEMMING:

Q. You were there the day of the accident, August 12, 1909?
A. I was employed there at that time, yes, sir.

ANTONIO FARRUGIA, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. You are the plaintiff in this case?
A. Yes, sir.

The COURT: This is the plaintiff?
Mr. DEMMING: Yes, sir.

The COURT: It is so nearly four o'clock, that I think it
26 hardly worth while to go on with this witness this afternoon. Gentlemen, you are excused until tomorrow morning at ten o'clock.

Court adjourned until Thursday, November 20, 1913, at 10 o'clock a. m.

27 FARRUGIA
vs.
PHILADELPHIA & READING RAILWAY COMPANY.

Second Day.

PHILADELPHIA, PA., *Thursday, November* 20, 1913—10 a. m.

Present: Parties as before noted.

ANTONIO FARRUGIA, recalled.

By Mr. DEMMING:

Q. Where do you live?
A. South Bethlehem.
Q. What is your business?
A. My business?
Q. At the present time are you working at anything?
A. No, sir.
Q. On August 12, 1909, for whom did you work?
A. I worked for the Philadelphia & Reading Company.
Q. You are a native of Italy, are you? You were born in Italy?
A. Yes, sir.
Q. How long have you been in this country?
A. Well, it will be twenty-seven years.
Q. Are you naturalized?
A. Yes, about twenty years.
28 Q. On the 12th of August 1909 you say you were working for the Philadelphia & Reading Railway Company?
A. Yes.
Q. What were you doing for that company?
A. I was foreman at that time. The first week I worked.
Q. The first week you worked for them you were not a foreman?
A. Yes, and the second week I started foreman of the gang.
Q. You were foreman of the gang?
A. Yes.
Q. What kind of a gang was this?
A. It was laboring men, shoveling dirt, shoveling stone, laboring men, all laboring men.
Q. Laboring men?
A. Yes.
Q. Where was your gang of men working? Where were you and the gang of men under you working?
A. Working on the gravel train.
Q. What part of the Reading Railway were you working on?
A. What day? The day of the accident, do you mean?
Q. You were working in the South Bethlehem yards of the Philadelphia & Reading Railway Company, were you, at that time?
A. All the time?
Q. No, at the time of the accident you were working in the

South Bethlehem yards of the Philadelphia & Reading Railway Company?

29 A. Yes. Bethlehem Junction.

Q. At Bethlehem Junction?

A. Yes, that is what you call it.

Q. You and your gang of men were digging and taking away dirt from the embankment, widening the yard of the Philadelphia & Reading Railway at that point? Is not that so?

A. Yes, sir.

Q. The dirt that you took from that embankment you and your men shoveled on these cars?

A. Yes, shoveled it on the cars, yes.

Q. And then the cars loaded with that dirt you took down to a point near or about the Hellertown station? That is true, is it not?

A. Yes, sir.

Q. And there you unloaded the dirt?

A. Yes.

Q. That is true?

A. Yes.

Q. Tell us how many times had your train with the dirt during this operation been down at the Hellertown Station before the accident?

A. I don't understand that question.

Q. How many times had your train been down to the Hellertown Station before the accident happened?

A. Oh, about four or five times.

Q. Four or five times?

A. At that track there I mean. On the track where the

30 accident happened.

Q. On the track where the accident happened?

A. Yes, four or five times.

Q. Four or five times?

A. Yes.

Q. You remember the morning of the accident, do you?

A. The first——

Q. You remember the morning of the accident, do you?

A. The 12th of August 1909, at about half past seven or eight o'clock in the morning.

Q. How many times had your train been down there the morning of the accident?

A. That is the first time.

Q. That was the first time?

A. Yes, the first load.

Q. How many men had you in your gang?

A. I got thirty-one that morning, and myself, thirty-two.

Q. How many cars had you on that train?

A. Five cars with the dirt full.

Q. Five cars full of dirt?

A. Yes.

Q. When that train left the Bethlehem yards to go down to Hellertown, where were you and the gang of men? What part of the train were you on?

A. On the coach car, on the passenger car.
Q. You had a passenger car in the train, too, had you?
A. Yes, sir.
31 Q. That was to accommodate you and the men going down?
A. To keep the men in there.
Q. Was that on the end of the train?
A. It was in behind the engine that morning.
Q. The passenger car was just behind the engine?
A. Yes, and back of that was the caboose, the engine was in front and it pushed the cars in front, the five cars that they got on, the engine pushed them ahead to the Hellertown station.
Q. When you got down to the Hellertown station with this train, what happened down there with regard to the passenger coach? Did they take the passenger coach off the train down at the Hellertown Station?
A. No, they left that, they just pushed it back, pushed the car ahead, cut them off and pushed the engine ahead, and the passenger car, too.
Q. They cut the passenger coach off?
A. No, the five cars of dirt, cut them off.
Q. They cut the five cars of dirt off?
A. Yes, they cut them off and left them on the switch.
Q. Then what did you and your men who were in the passenger coach do?
A. Yes, we were in the coach, everybody was in there.
Q. Then you and your men got out of the passenger coach?
A. Yes, got on the dirt cars.
Q. You all got out of the passenger coach?
A. Yes, sir.
32 Q. And you walked down along the track to get on the dirt cars?
A. Yes, sir.
Q. At that time where were the dirt cars with respect to the Hellertown station? Were you just exactly opposite the station, or where?
A. Right in front of the station, near it.
Q. Right in front of the station?
A. Yes.
Q. I will show you some photographs. I show you a photograph marked "A" and ask you whether or not that represents the Hellertown Station. This is a little leading, but I guess there is no dispute about it. Does that represent the station, on the right of the picture, that building? What is it?

Mr. Mason: I think we can admit all that. I don't think there will be any dispute about that.
The Witness: Yes, I see the pole. I see the pole.

By Mr. Demming:

Q. I am not talking about the pole yet. Does that represent the station? That is the station, is it not?

A. Yes.

Mr. MASON: It is admitted that that is the Hellertown station.

Mr. DEMMING: I want to get it on the record.

33 By Mr. DEMMING:

Q. That represents the Hellertown Station?

A. Yes.

Q. I show you a photograph marked "B." Does that represent the Thomas Iron Company looking toward Bethlehem from the Hellertown Station? That is right, is it not?

A. Yes, sir.

Q. Do you see the track there on that photograph that your train was on at the time the accident happened, the track on the extreme left of the photograph?

A. Yes.

Q. That is the track?

A. Yes.

Q. I will show you a photograph marked "C." That also represents the Hellertown Station taken at a point a little below the station, does it not?

A. Yes.

Q. Do you see the track on that picture that the accident happened on, that the train was on when the accident happened?

A. What do you mean? This is the track.

Q. The track over on the extreme left of the photograph, the one that has a Gondola car standing on? That is the track, is it not?

A. Yes.

Q. And in the photograph marked "E," the track the accident happened on, that is the track on the right of that photo-

34 graph, is it not?

A. Yes.

Q. Going down towards the quarries?

A. Yes, sir.

Q. The station is back here?

A. Yes.

Q. And in the photograph marked "D," the track on which the accident happened is represented on the extreme right where the engine and the little cars are? Is not that so?

A. Yes.

Q. After you and your men got off the passenger coach, and the dirt cars were uncoupled from the passenger coach, and the men walked down, as you say, to their positions, to get on the train, on the dirt train, just tell us in your own way what happened after that?

A. Well, everybody tried to get on the cars, the first cars they could reach. Every man is not in one place. He is standing along the train, to get on the train, and everybody got on the train. I got on the train myself.

Q. Before you got on the train, did the rest of the gang all get on ahead of you?

A. Yes.

Q. You got them all on the train first?
A. I got them on the train first.
Q. Which car of the train did you get on?
A. On the fifth car, on the front, on the back step.
35 Q. The fifth car?
A. Yes.
Q. The front of the fifth car?
A. Yes, on the back step.
Q. On the back step?
A. Yes, on the back step, because the car has got two steps, one behind and one in front. No, it has got four steps, on that car. You know, and everybody knows that you have got four steps. I got on the back step.
Q. The back step? By the back step do you mean the step farthest from the engine, or the step next to the engine?
A. No, the fifth car. The engine is on the front car. There are five cars on the front. They pushed ahead, and I was on the head car. I was on the head car. Do you understand?
Q. When you got on the car, or when you started to get on the car, what was the train doing with regard to motion? Was it moving or standing still?
A. Well, they just pulled the pin, and go ahead, and then when they got everything going ahead, you know, I was on the ground, and at the same time the train moved. I had my foot on the step of the car, and I got my hands ahold, I was in the air, you know, and the train goes ahead.
Q. Let us get back to the cars. We do not quite understand which car you were on. There was an engine there, was there not?
A. Yes.
36 Q. It was not the same engine that brought you down from the Bethlehem yards, was it?
A. No.
Q. It was another engine that came up and coupled on?
A. Yes, another engine.
Q. And this other engine came up and coupled on to the five cars, did it not?
A. Yes.
Q. The car that you tried to get on, was it the car next to the engine?
A. No.
Q. Was it the car last from the engine?
A. Last from the engine, yes.
Q. Last from the engine?
A. Yes.
Q. Was the engine down at the end of the train towards Philadelphia, or up at the end of the train?
A. No, Bethlehem.
Q. Up at the Bethlehem end?
A. Yes, to go to Bethlehem.
Q. You tried to get on the last car from the engine. That would be the fifth car?

A. Yes, sir. I told you that.

Q. Did you try to get on the end of that car toward the engine, or toward the end of the train?

A. Near the engine.

Q. Near the engine?

37 A. Yes.

Q. This was at a place between the fifth car and the fourth car that you tried to get on?

A. Yes, between the fourth and the fifth.

Q. I understood you tried to get on the fifth car?

A. Yes.

Q. When you tried to get on, when you started to get on the fifth car, was the train moving, or was it standing still?

A. Well, I got on, and the train moved right away. As soon as I got my hands on, and my foot on the step, the train moved and goes ahead.

Q. You put your hands that way, describing it. Do you mean you put your hands on the grab iron?

A. Yes, on the grab iron, what you call it. On the iron, sure.

Q. When you put your hands on the grab iron to get on the train, was it moving, or was it standing still?

A. Well, it was just moving. They pulled the pin in, and go ahead that way.

Q. What pin do you mean?

A. On the engine, when they coupled them up with the car.

Q. When you put your foot up on the stirrup or the step of the fifth car, was the train moving, or was it standing still?

A. I got on. When I got on it moved right away.

Q. When you got on it it moved right away?

38 A. Yes. I was in the air.

Q. You were in the air?

A. Yes. I had one foot on the step, and I wanted to try to get on the bottom of the car, on the train of the car, and I ain't got time.

Q. You have not got time?

A. No, I have not got time, and the pole struck me.

Q. Where were you, and what were you doing when the train first started to move?

A. What was I doing?

Q. Yes.

A. Everybody tried to get on the cars the best they can for to go ahead.

Q. I asked you, where were you and what were you doing when the train first started to move?

A. I was alongside of the car.

Q. And what were you doing at that time when it first started to move?

A. What was I doing?

Q. What were you doing.

A. I was doing nothing. The same as everybody is doing that wants to catch the car, to get on.

Q. Do you mean you were getting on when the train started to move?

A. No, the train has not started to move. I just got on, I was in the air, and the train moved.

Q. When you were in the air the train started to move?

39 A. Yes.

Q. What do you mean by that? Explain that, because none of these gentlemen saw it, you know. You must try to make it clear. What do you mean by that?

A. I got on the steps, and I got my hand ahold of the grab iron, what you call it, and my foot was on the step, and the train moved and knocked me off.

Q. After that what happened?

A. What happened?

Q. After you started to get on the train, what happened? Just tell us what happened in your own way?

A. The pole struck me and knocked me down to the ground.

Q. The pole struck you?

A. Sure.

Q. Where were you when the pole struck you?

A. What place are you talking about?

Q. Where were you when the pole struck you?

A. I was on the step. I had not a chance to get on the car.

Q. Were you trying to climb up on the car at the time, or were you standing still on the step?

A. No, I was not standing still. I ain't got time to stand still. They did not give me a chance. The pole came and struck me and knocked me down.

Q. They did not give you a chance to do what?

A. To get on the car.

40 Q. To get on the car?

A. Yes.

Q. Which pole was it that struck you?

A. That pole in front of the station next to the signal, the first pole.

Q. The pole next to the signal pole?

A. Yes, the board, they call it, that big iron, the next one, the next pole.

Q. How long after you tried to get on the train, and it started up was it before this pole struck you? About how long a time was it?

A. Oh, it don't take long. About four or five seconds, I think. No more than that.

Q. No more than that?

A. No.

Q. As I understand it, you first passed the signal pole before you were struck, then it was the first pole on the other side of the signal pole that struck you? Is that right?

A. Yes.

Q. About how far, so far as you can judge, were you standing from the signal pole when you started to get on the train?

A. Oh, about thirty-five or forty feet.

Q. Thirty-five or forty feet, you think?
A. I did not measure it exactly. That is what I think. It was not so far, anyhow.
41 Q. After the accident you went out there to see this pole that struck you, did you not?
A. I was near the pole.
Q. After you got out of the hospital, you went out there to see the pole that struck you?
A. Yes, to measure the pole.
Q. You took Father Octaviano out there to measure the distance?
A. The Priest, yes. I did that.
Q. You showed him the pole that struck you?
A. Yes, and he measured it himself.
Q. How far from the signal pole do you think that pole was that struck you?
A. Oh, not so far. About ten or twelve or eleven feet, something like that.
Q. I show you a photograph marked "A," and ask you whether you can see the signal pole in that photograph opposite the Hellertown Station?
A. Yes, that is the one in front of the station.
Q. Is that the signal pole there?
A. That is the signal pole.
Q. Is that the pole that struck you, standing right near it?
A. Yes, and that is the signal pole.
Q. It was the telegraph pole that struck you?
A. The telegraph pole, yes, sir.

(Referring to photograph marked "A.")

42 Q. What kind of a car was this you were trying to get on? Was it a flat car?
A. No, no flat car. It was a big car, a high car, you know, four or five board car.
Q. Four or five boards?
A. Yes.
Q. And filled with dirt?
A. Yes.
Q. Was there any other handle that you could get hold of to get on that car except the one you did get hold of?
A. That is all. It has only got four handles. That is all.
Q. Was there any other way of getting on that car except the way you were getting on?
A. That is the only place I can go to get on the car.
Q. What part of your body did the pole strike?
A. On the left side.
Q. The left side?
A. Sure.
Q. After the pole struck you, what happened to you?
A. What happened to me?
Q. Yes.
A. I laid down on the ground.

Q. It knocked you down?
A. It knocked me down on the ground. I got on the ground and the foot, it got cut off right away, and the train go on.
43 Q. Did you fall over the rail?
A. I do not fall over the rail. I fall in the ditch, and the foot go on the rail.
Q. The foot was on the rail?
A. The right foot was on the rail, and I sat down in the ditch.
Q. How many cars went over your foot, or your leg?
A. All the cars and the engine.
Q. All the cars and the engine?
A. Yes.
Q. Do you mean that? Do you mean that the whole train went over your foot?
A. Oh, sure. The train go away. The train don't stop at all.
Q. Where did the train stop for the first time after your accident?
A. The train stopped far away, about four or five hundred feet.
Q. Then they came back and picked you up, did they?
A. One of the men came up there, he was on the train, as soon as the train stopped, he came up to the place, and he asked me, he said, "What are you doing?" I said, "Don't you see what I am doing?"
Q. You are not allowed to say what anybody said to you. After that you were taken to the hospital?
A. Yes.
Q. What hospital did you go to?
44 A. St. Luke's Hospital.
Q. In South Bethlehem?
A. Yes, sir.
Q. How long were you there?
A. I was there seventeen days.
Q. Seventeen days?
A. Yes.
Q. What did they do to you in the hospital? Did they operate on your leg?
A. Yes, they take the joint apart in the leg.
Q. And they cut it off, did they?
A. They cut off my leg at the joint, and keep me there seventeen days.
Q. Whereabouts is your leg off? It is your right leg?
A. My right leg.
Q. Whereabouts is it off?
A. Up above the knee.
Q. Above the knee?
A. Yes.
Q. Between the knee and the hip?
A. Above the knee, yes. I ain't got any knee.
Q. Just explain it to the jury. Just show it to the jury, where your leg is off. Above the knee?
A. Yes.

Q. Before this time had you enjoyed good health?
A. Oh, I was sick right along.
Q. I say, before the accident?
45 A. Oh, yes, before the accident, sure.
Q. How old a man were you at the time of the accident?
A. Oh, about forty-nine.
Q. Forty-nine?
A. Yes.
Q. Since the accident, since you got out of the hospital, what has been the condition of your health?
A. When I got out of the hospital?
Q. Yes, after you got out?
A. I was sick right along for four months.
Q. Right along?
A. Yes, sir.
Q. Have you obtained any artificial legs? Have you tried to use artificial legs?
A. Yes, I tried first one man in New York, and I can't get along at all.
Q. You can't get along with it?
A. No.
Q. Then did you try another one after that?
A. I tried another one, a Philadelphia man make me one, and I can't get along either, because the stump is sore, and it pained me right along, it pains me now. The whole time it pains me right along.
Q. It pains you at the present time?
A. Yes, it pains at the present time. I can't sleep last night, neither.
Q. Did you suffer any pain in the hospital when you were
46 there?
A. Sure. All the time. I never stopped.
Q. During the four months you were sick afterward did you suffer pain?
A. Yes, sir.
Q. What did you have to pay for the first artificial leg you got?
A. I paid one hundred dollars for the first one.
Q. What did you pay for the second one?
A. I paid one hundred dollars for the second one, too.
Q. You had no expenses in the hospital?
A. No, I don't pay.
Q. After you got out of the hospital and you had this illness as the result of the accident, did you pay any doctors?
A. Oh, yes, sure.
Q. What have you paid from that time down to the present time for doctors' bills?
A. Doctors' bills cost me about $150.

Mr. MASON: I object to that, unless it is going to be followed up by medical testimony to connect the attendance with the injury.
The COURT: Are you going to produce medical testimony?

Mr. DEMMING: We have not got the doctors here, no, sir. I did not think it was necessary. They wanted very large fees for coming down here from Bethlehem. They are professional men.
47 The evidence is this, the man never had a day of sickness. Both he and his daughter will testify to that. His daughter is here to testify to the same effect as the plaintiff. The evidence is that this man never had a day of sickness before the accident, and afterwards, on account of ether and the operations which he had to undergo in the hospital, his stomach was affected, and he has been an ill man ever since, and medical attendance was absolutely necessary, according to their testimony, as a result of this accident.

The COURT: What period did this cover?

By Mr. DEMMING:

Q. How long a time did you have to have medical attendance as the result of this accident?

Mr. MASON: I object to the form of that question. How long after the accident did you have medical attendance?

By Mr. DEMMING:

Q. How long after the accident did you have to have medical attendance?

A. Doctors, do you mean?

Q. Yes, a doctor?

A. Sure, I had a doctor.

Q. How long a time did you have to have a doctor?

A. Four months.

Q. For four months?

A. I was sick for four months, bad sick.

Q. Where were you sick?

48 A. I was sick all over. Sick in my leg, pain in my leg, and my stomach, all over, no feel good, not at all. I can't eat good, or nothing. No good.

Q. And before the accident did you have any of those symptoms?

A. Never in my life.

Q. Did you ever have a doctor before the accident for anything at all?

A. No, sir.

Q. You were a perfectly healthy man?

A. Yes.

The COURT: Do I understand that the medical attendance began immediately after he left the hospital? Is that what he says?

By Mr. DEMMING:

Q. Did you have to have a doctor immediately after leaving the hospital?

A. Certainly I had a doctor.

Q. And that continued for four months after it? Is that true?

A. I had to have different doctors, you know. I had a different doctor. I had four doctors after that.

Q. Four doctors?
A. Yes.
Q. And they doctored you for what?
A. For the leg.
Q. What is the matter with the leg?
49 A. The leg pained all the time, and kind of sore, you know, and they rubbed it up, you know, all the time, put some stuff on the leg all the time. The doctor attended me.
Q. Rubbed it, kneaded it?
A. Yes, sir.
Q. Did you pay those doctors anything?
A. I did pay. Certainly I did.
Q. Each time you saw them did you pay them?
A. Yes, sir.

Mr. DEMMING: It seems to me, under that testimony, it is admissible, what he paid.
The COURT: Why is not it admissible?
Mr. MASON: My only thought about it was that he had testified that the medical treatment was from the time of the accident down to the present time.
The COURT: It appears it only covered four months.
Mr. MASON: If it only covers four months, I think probably there is sufficient here to justify the question. There was not before I made my objection, but I think we should be sure it does cover only the four months.

By Mr. DEMMING:

Q. Since those four months, did you have to have a doctor, too?
A. Since the four months?
Q. You say you were at the hospital for seventeen days,
50 as I remember it?
A. Yes.
Q. Then, after that you were sick for four months?
A. Yes.
Q. As a result of your leg, the injury to your leg, you had to have doctors, four doctors, you say?
A. Yes.
Q. After that time, after the four months, did you have to have doctors on account of you leg?
A. Not for the leg. After that I got two operations for appendicitis, after that.
Q. For appendicitis?
A. Yes, sir.

Mr. MASON: That is the reason for my objection. That is the pertinency of it. If you can distinguish between the medical attendance he had for four months and since then I have no objection at all.

By Mr. DEMMING:

Q. For the four months, for the treatment during the four

months, or at any other time you had to have treatment on account of your leg, on account of the injury to your leg, what did you pay to the doctors?

A. It cost me about $150.

Q. What did you pay for liniments and medicines?

A. About fifty dollars.

Q. During that time?

A. Yes, sir.

51 Q. What were you earning at the time of the accident? How much did you earn at the time of the accident?

A. How much?

Q. Yes. What were your wages? How much money did the railroad company way you?

By the COURT:

Q. What were your wages?

A. My wages were $1.87 a day I got.

By Mr. DEMMING:

Q. How many days a week did you work?

A. Twenty-seven, twenty-eight and twenty-six.

Q. A month.

A. A month.

Q. You mean a month?

A. A month, sure.

Q. Twenty-six, twenty-seven and twenty-eight?

A. Yes.

Q. Were you paid by the month, or paid by the week, or how?

A. By the month.

Q. How much would your pay checks amount to each month?

A. What is that?

Q. We will figure that out.

A. You can figure that out, how much it comes to.

Q. Since the accident, how much have you been able to earn?

A. None at all.

Q. Nothing at all?

52 A. No.

Q. Have you tried to work?

A. I have tried and I cannot get along.

Q. What did you try to work at?

A. I tried shoemaking, and do something, but I can't get along, I got sick. I got sick, I am no good, I cannot sit. The pain don't let me sit.

Q. Going back to this pole that struck you, you say that train had been down there four or five times before the accident. Had you ever had occasion to notice that pole before the accident?

Mr. MASON: I object to that. I think that he can testify as to the position of the pole, what the witness did, and his opportunity for observation, but the question is objectionable in the form in which it is put.

The COURT: You are asking whether he ever had occasion to observe it.

Mr. DEMMING: I will withdraw that question.

By Mr. DEMMING:

Q. Had you ever seen this pole before?
A. Never took notice.
Q. You never noticed it before?
A. No, sir.
Q. And how many times a week had you been down there where the pole was before the accident?
A. About four or five times. Four or five trains.

53 Cross-examined.

By Mr. MASON:

Q. Have you still got the store you had at the time of the accident? You had a store?
A. I ain't got any store at all. My wife keeps it.
Q. Have you got a store now? W-ere are you living now?
A. It don't belong to me, that store.
Q. W-ere are you living now?
A. I live at 425 East Fourth Street, South Bethlehem.
Q. Have you been living there ever since the accident?
A. Sometimes I am there, and sometimes I live in Phillipsburg. I did.
Q. How long did you live in Phillipsburg?
A. I lived there for five, six or seven months, I think.
Q. Who did you live with there?
A. I lived with my children and my wife.
Q. Was not your wife living in South Bethlehem at that time?
A. She stays with me.
Q. You have gone back to South Bethlehem, where you have the store?
A. No, my daughter has the store at that time.
Q. You own the store, don't you?
A. No, I don't own the store.
Q. Who does own it?
A. My wife owns it. My wife owns the store. I ain't
54 got nothing.
Q. And do you keep the store for her? Do you help her keep the store?
A. I can't do nothing in the store, or no place else.
Q. Don't you go in and help them keep the store sometimes?
A. Never.
Q. How long were you doing shoemaking?
A. I don't know. About eight or nine months.
Q. And how long had you worked for the railroad company before the accident?
A. Before the accident?
Q. Yes.

A. I worked about fourteen or fifteen years for the company.
Q. You were off for a while, and when you came back Mr. Stockert gave you the job as foreman? You were away from the company for a while, and when you came back again——
A. The last time, yes.
Q. The last time?
A. Yes.
Q. When you came back Mr. Stockert gave you a position as foreman of the gravel gang?
A. He did.
Q. On this day you were taking the load of dirt across to dump it into the fill at the Thomas Iron Company?
A. I don't know what fill it is.
55 Q. On the cars going down to Hellertown?
A. Yes.
Q. This little dinkey engine took them on to the Thomas Iron Company siding, did it not?
A. They take them to one track, I don't know who that track belongs to.
Q. There was a little engine coupled up to them?
A. Yes, one engine coupled up to the cars.
Q. And took them down this siding?
A. Yes.
Q. Before the accident happened you had been working there for several days?
A. No, not several days.
Q. How many?
A. A couple of times, four or five trains down there.
Q. When you got the dirt down there on these other occasions you took the dirt out of the cars and threw it down the bank, did you not?
A. At the side of the track, both sides.
Q. And on those occasions where were you on the train when the engine pulled the cars down by this pole?
A. What do you mean? On the dirt car, do you mean?
Q. Yes.
A. Where was I, you mean?
Q. Yes.
A. I was where the men were alongside of the car, alongside of the train. We got to the cars——
56 Q. No, you had been there four or five times before?
A. Yes.
Q. On those four or five times, when you went by this pole, were you hanging on to the car, or were you in the car?
A. Inside the car.
Q. Inside the car?
A. Inside the car.
Q. And all the other men were inside the car?
A. Yes.
Q. Anybody got hurt?
A. No, nobody, because nobody is there.

Q. And you saw these poles alongside the track as you went down?

A. I never took attention to them.

Q. You never paid attention to them?

A. No, sir.

Q. But they were there? The poles were there?

A. This pole was there. The track was there, too. The track was there. I don't look for it.

Q. But you paid no attention to it?

A. No.

Q. On this morning all the other men had gotten into the cars before the engine started?

A. Yes, everybody climbed in at the same time.

Q. Everybody got in?

A. Everybody climbed at the same time, and the train
57 moved, what I told you before, I was on the step of the car and the train moved, going ahead.

Q. How fast was the train moving when you tried to get on it? Fast or slow?

A. It don't go very fast.

Q. Was it moving faster than you could walk? Did you have to run to catch it?

A. No, I don't run at all.

Q. Did you walk fast to catch it?

A. No, I did not walk fast to catch it?

Q. How fast was it moving when you tried to get on?

A. Well, the engine puffed up the steam to go ahead, and that is all.

Q. It just moved off?

A. It just moved off.

Q. Before you tried to get on?

A. No, I don't get on at that time in the car.

Q. Don't you remember that the last time you testified that you said the train was moving when you tried to get on?

A. When I got on it moved.

Q. You said you were standing down on the ground watching to see that the other men had gotten on the train?

A. I don't say that. I don't say that. I say this, that I was in the air, I had my foot on the step, and my hands on the iron, what you call it, the grab, what you call it.

58 Q. The grab iron?

A. I had my hands on the grab iron and my foot on the step, and I tried to get on, and I ain't got time. That is what I said.

Q. When you testified before Mr. Demming was your lawyer then, was he not?

A. Yes.

Q. He asked you questions the last time you were down in court, did he not?

A. Yes.

Q. He asked you this question: "Q. Do you mean the train was moving when you got on?" And you said "Yes, it was moving slowly".

A. That is what I say now, it moved slow when I got on the car.

Q. But when you tried to get on——

A. No, when I got on the car. When I got on the car it was moving.

Q. Let us see. Wait a minute. Was not this question put to you by me: "Q. And Mr. Stockert told you to tell these men not to get on the train when it was moving, did he not? Did not he give you orders to keep the men off the train when it was moving?" And you said this, "A. Sometimes it was that way. He never said anything to me like that. Of course, I know that myself. I do that myself, many times, with the gravel train. It is moving, and we have to work when it is moving, many times the train is moving
59 and you have to work, because it is moving slow, you know, at that time, moving slow, and everybody gets on". Did you say that?

A. No.

Q. I asked you this question: "Q. How fast was it going when you got on? A. Not so fast. Anybody can get on if he wants. Anybody can get on, too." Didn't you say that?

A. Well, I meant after I got on it don't go very fast. Anybody can get on. That is what I said. I say that now, too.

Q. Isn't it true that the train was moving on when you tried to get on the train, and while it was moving, before you could get up into the car, the pole hit you?

A. No, sir.

Q. That is not true?

A. No, sir.

Q. Was the train standing still when you tried to get on?

A. When I got on, yes. I was on the step, and it goes ahead, it moved. It don't give me a chance to get on the bottom of the car.

Q. And you did not say at the last trial that the train was moving when you got on?

A. It was kind of mixed. I don't know.

Q. Don't you remember saying at the last time that the train was moving when you tried to get on?

A. Yes, after I got on it moved slow. That is what I
60 said. Not when I got on. After I got on it was moving slow.

Q. Did you say at the last trial that the train was moving when you tried to get on the step?

A. After I was on the step you asked me if the train was going fast, how fast was it going. It goes slow. Anybody can get on. That is what I said.

Q. Now what do you say, that the train was standing still, or was it moving when you first put your foot on the step?

A. I put my foot on the step, I got one foot on the step, and my hands on the grab iron, and the train moved slow, and pulled me and knocked me off. That is what I say. I meant to say that. I tell you the truth.

Q. Who have you talked to since the last trial about the way the train was moving? Have you talked to Mr. Demming about it?

A. I never saw Mr. Demming since that.

Q. Who have you talked to about whether the train was moving?

A. Nobody.

Q. Nobody at all mentioned the fact of how the train was going since the last trial?

A. No.

Q. Not a soul?

A. No.

Q. Are you sure about that?

61 A. Yes.

Q. And you are positive now that the train was not moving when you tried to get on it?

A. Yes, positive.

Q. I think that is all from you, if that is the case.

Redirect examination.

By Mr. DEMMING:

Q. Mr. Mason asked you whether or not you were not trying to work as a shoemaker in Phillipsburg. You said you were working down there for eight or nine months. Were you able to make any money down there at that time?

A. No, not much. Just enough to pay the rent, you know.

Q. Just enough to pay the rent?

A. Well, sometimes it reaches it, and sometimes it don't reach for the rent.

Q. And then you came back to your place in South Bethlehem?

A. I came back to Bethlehem again. My daughter kept the place at that time.

Q. Your daughter kept the place?

A. She kept our place there.

Q. She kept the little store in South Bethlehem?

A. Yes, a little candy store, you know. My daughter gave me so much to go down, and I stay there.

Q. Where are you living now? Are you living there now, or in South Bethlehem?

A. I live at the store with my wife.

Q. With your wife, you are living there?

62 A. Yes, sir.

Q. You and your wife together have that store, have you?

A. No, not together.

Q. Whose store is it?

A. My wife's store. I ain't got nothing.

Q. Are you able to do any work at all in the store?

A. No, I can't do anything at all in the house.

Q. Going back to the train again, Mr. Mason asked you something further about whether or not it was standing still or moving

at the time you got on. Do you remember there was a former trial of this case, a common law action? You remember that, don't you?

A. Yes.

Q. You came down to this court house?

A. Yes.

Q. To testify?

A. Yes, sir.

Q. What was it that you intended to say——

Mr. MASON: I object to that before he goes any further. What he did say is the point.

Mr. DEMMING: His testimony was just as mixed then as it possibly could be. The man could not speak very good English. Your Honor did not try that case, I remember, but it was very difficult to find out exactly what he meant at the time, and I would like to show the jury——

Mr. MASON: The notes of testimony are in Mr. Dem-
63 ming's possession. He can read the notes of testimony.

The COURT: You cannot ask him what he intended to say.

Mr. MASON: The notes of testimony are as clear as a bell, because the whole theory of his case was in protection against getting on a moving train, to show that it was necessary for him to wait until the other men got on, that he had to get on while it was moving. His whole questions are in that direction.

The COURT: Not what he intended to say. What he did say is the basis on which he can be examined. Not what he intended to say.

Mr. DEMMING: The notes of testimony may be very clear. Of course, they do not represent exactly what the man did say, and his actions on the stand. There are many words and many things he did say that are not in the notes at all.

By Mr. DEMMING:

Q. Did you have any notice that the train was going to start?

Mr. MASON: That is objected to.

The COURT: What is your objection, that that is not alleged as a ground of negligence?

Mr. MASON: It is totally irrelevant as far as the pleadings are concerned.

The COURT: I think the question of notice is irrelevant, the question of notice of starting the train. You claim that he was
64 injured by reason of the proximity of this pole on the track.

Mr. DEMMING: Yes.

Mr. DEMMING: I had an interpreter here yesterday, and he had to go back to South Bethlehem. I have here this morning this lady, Mrs. Rose Merino, who is the daughter of the plaintiff, and she can speak Italian. I found her intelligent. I would like to have her act as interpreter in this case.

Mr. MASON: I object, as the case has developed, to any member of the family acting as interpreter.

The COURT: It seems to me it would hardly be proper, unless Mr.

Mason has an interpreter to hear it. If he had an interpreter to hear it, to listen to the interpretation, it would be different.

Mr. DEMMING: While we are waiting for an interpreter, I will read the testimony that has been agreed to here, the testimony of the man who went out and measured the distance between the pole and the rail. He has removed to a remote part of New York State, and Mr. Mason has kindly consented that I can read the testimony that this man gave at the former trial.

Mr. Demming read the testimony of Rev. Dominick Octaviano, as follows:

Rev. DOMINICK OCTAVIANO, having been duly sworn, was examined as follows:

65 By Mr. DEMMING:

Q. You are a resident of South Bethlehem?
A. Yes, sir.
Q. How long have you been there?
A. Four years and a half.
Q. Do you know Farrugia, the plaintiff here?
A. Yes.
Q. Did you know him at the time of the accident?
A. Yes, sir.
Q. He is a member of your parrish?
A. Yes, a very good member of my congregation. I know him very well.
Q. When Farrugia got out of the hospital after the seventeen days he said he was there, did you go with him down where this pole was located?
A. Yes, that is right; I and he and Charlie Veto went over to see how far the pole was from the track.
Q. Did Farrugia point out the pole to you?
A. Yes, sir, he did.
Q. He showed you the pole that struck him?
A. Yes, sir.
Q. Did you measure how far that pole was from the rail?
A. Yes, I did.
Q. Tell us how far?
A. Measuring the distance from the rail close to the pole it was three feet two inches.

Q. From the nearest point of the rail to the nearest point
66 of the pole it was three feet two inches?

A. Yes. At the same time I measured this lap of the car, on this side, to the side of the pole was almost the same distance, and very little space left.
Q. I do not understand you. You mean——
A. I measured the car underneath, from the wheel to the top—this side—to where the side of the car comes out close to the pole, and I found that this distance was——
Q. Three feet two inches?
A. Almost the same distance as from the rail to the pole, almost.

Q. You mean that the distance from the nearest point of the rail to the nearest point of the pole was three feet two inches?
A. That is right.
Q. To this particular pole?
A. Yes.
Q. You measured a car standing near there?
A. Yes, sir.
Q. An ordinary box car?
A. Yes, sir.
Q. I do not mean a box car—an ordinary coal car, with sides?
A. Those cars standing along the track.
Q. Were they coal cars?
A. I think they were; I cannot say exactly.
Q. The distance from the wheel to the side of the car
67 was almost three feet two inches?
A. Almost, not exactly, but there was a little room left.
Q. You did not see the accident?
A. No, I did not see the accident.

Cross-examination.

By Mr. MASON:

Q. Which pole was it, the pole that is right opposite Hellertown Station there?
A. Not directly in front of the station.
Q. A little to one side?
A. A little this way.
Q. There are two poles there almost together there, are there not?
A. I think so, I do not remember very well.
Q. Which pole was it that Farrugia pointed out to you?
A. This pole on the side going up to the station.
Q. I mean, was it a pole that had a signal on it or the pole—it was the signal pole, was it not?
A. I do not remember that.

Redirect examination.

By Mr. DEMMING:

Q. You know a telegraph pole, do you not?
A. Yes, sir.
Q. Was it a telegraph pole or what?
A. I do not remember exactly, but I think it was a telegraph pole. I do not know. It was a pole right there anyway. I did not take notice. I do not think it was the signal pole. I think it
68 was the telegraph pole.
Q. Did you measure the distance the other poles were from the track around there?
A. I did measure the distance from the main rail to the pole, and found that this distance was——

(Objected to by counsel for defendant.)

The WITNESS: That is the only thing I did.

(Counsel for defendant objects to witness testifying to the distance of any other pole or any other particular track, on the ground that he is not the character of witness that would be competent to testify to such measurements).

The COURT: In the present state of the evidence it seems to me to be immaterial.

By the COURT:

Q. How many poles did you measure?
A. About four or five.

The COURT: The objection is sustained.
(Exception for plaintiff noted by direction of the Court.)

By Mr. DEMMING:

Q. Father, Charlie Veto did the same thing?
A. Yes."

NATALIE DAVI, called.

Joe Logan was sworn to act as interpreter.
(Witness sworn through the interpreter.)

69 By Mr. DEMMING:

Q. Where do you live?
A. Mahonoy City.
Q. What do you work at?
A. Steel work.
Q. Do you know the plaintiff in this case, Antonio Farrugia?
A. Yes, sir.
Q. How long have you known him?
A. I know him eight years.
Q. Were you a member of his section gang in August, 1909, when he met with the accident?
A. Yes, sir.
Q. At that time was the gang of which you were a member taking dirt on a dirt train from the Bethlehem yards to a point near the Hellertown Station?
A. Yes, sir.
Q. What time of the day did the accident happen to Farrugia?
A. I could not just quite remember, but it was the first trip in the morning, about from eight o'clock to ten, between that.
Q. The first trip in the morning?
A. Yes.
Q. How many days had your work train been pushing dirt down to that place before the accident?
A. About four or five times, that I remember.
70 Q. Four or five times before the accident altogether?
A. Four or five times before this accident took place.
Q. At the time the accident happened to Farrugia, where were you?

A. We were out getting on the cars. We were out getting on the train.

Q. On the train coming down from the Bethlehem yards there was a passenger coach, was there not?

A. Yes, sir.

Q. Were you and the rest of the men and Farrugia in the passenger coach coming down?

A. There were other passenger cars coming down.

Q. Then when the train got down to the Hellertown station, the passenger coach was taken off, was it not?

A. The engine took the passenger coach away.

Q. And then you and the rest of the men and Farrugia all got out of the passenger coach and walked down to get on the dirt train?

A. They all walked down to get on the dirt train.

Q. Where was the dirt train at that time with reference to the Hellertown station, with reference to the building? Was it opposite the building, below it, or above it?

A. I don't remember.

Q. How many cars were in the dirt train?

A. Five.

Q. Which track were you on? The farthest track from the station?

71 A. The farthest track from the station.

Q. Opposite the station?

A. Yes.

Q. That would be the fourth track?

A. I don't remember which track.

Q. At all events, it was the farthest track. Did you see the accident?

A. Yes, sir, I saw it.

Q. What car were you on?

A. I was on the third car.

Q. The third car from the engine or from the end of the train?

A. There were two between. One in the middle. I was on the middle car.

Q. Just tell us in your own way what you saw.

A. Well, they were getting on the car, he was on the first car, and while I was getting on, he got caught.

Q. We will have to have that a little clearer, what you mean by that.

A. While they were getting in the cars, he was in the first car, and while they were getting in, he got caught in the cars, while these fellows were getting in.

Q. By "he" you mean Farrugia?

A. Yes, sir.

Q. By the first car you mean the last car from the engine?

A. The end car.

Q. The fifth car?

72 A. Yes, sir.

Q. Was Farrugia trying to get on the fifth car?

A. Yes, sir.
Q. Did you see Farrugia when he first tried to get on the train?
A. No, sir, I did not see him.
Q. Do you know whether the train was moving or standing still when Farrugia first tried to get on?

Mr. MASON: That is objected to. He says he did not see him when he tried to get on the train.
The COURT: How can he testify to that, when he did not see him try to get on the train?
(Objection withdrawn.)

The WITNESS: When he was getting on the train it was still moving along slow, it just started to move along slow, the train was just started to move along slow when he was getting on.

By Mr. MASON:

Q. When Farrugia was getting on, how far was Farrugia from the signal pole, if you know?
A. I don't know. I don't know how far he was away from it. It was pretty close, though.
Q. Pretty close to the signal pole?
A. Yes.
Q. Cannot you indicate here in the Court room about how far away that pole was?
A. He was about two or three seconds before *he* got to the
73 pole.
Q. After he first started to get on?
A. While they were getting on it was moving along slow, and it was two or three seconds until he got to the pole.
Q. Did you see the pole strike Farrugia?
A. No, sir.
Q. You did not see that?
A. No, sir.
Q. Do you know which pole it was that struck Farrugia, the signal pole or the telegraph pole?
A. The signal pole, the second pole down there.
Q. The second pole struck him?
A. Yes.
Q. The second pole that the train passed or Farrugia passed?
A. The pole after the telegraph pole. The second pole down.
Q. The first pole is the signal pole?
A. The telegraph pole.
Q. The pole that struck him is the telegraph pole?
A. Yes.
Q. Do you recognize that photograph marked "A"?
A. This is the one right here (indicating).
Q. That is the track over there. Which one of those two poles? That is the signal pole and that is the telegraph pole. You do not recognize that photograph?
A. I cannot remember which one it is.
74 Q. You do not recognize that photograph, then?
A. No.

Q. When the pole struck Farrugia, what was Farrugia doing?
A. He was getting on when the pole struck him.
Q. Getting on the train?
A. Yes, he was getting on the train.
Q. Do you know if Farrugia had ever seen that pole?

Mr. MASON: That is objected to. (To the interpreter:) Do not ask that question.
(Question withdrawn.)

By Mr. DEMMING:

Q. After the pole hit Farrugia, what happened to Farrugia?
A. He got his leg hurt and his nose and face.
Q. He was knocked down under the train? Is that right?
A. Yes.

Cross-examined.

By Mr. MASON:

Q. At the time Farrugia was struck by the pole, had all the other men gotten into the train?
A. Yes, sir.
Q. How many days had you been carrying dirt on this siding before the accident happened?
A. About four or five days. Four or five times.
Q. Four or five days, was it not?
A. I don't know if it was four or five days or four or five times.
Q. You said the last time you testified, or didn't you say
75 the last time you testified that it was four or five days you had been working there?
A. I don't remember if it was four or five times or four or five days.
Q. How often each day did you go down to this siding before the accident?
A. Maybe once a day, maybe twice. Sometimes I would not go down at all.
Q. And on these other times when you had been down there Farrugia got on the train with the rest of the men, did he not?
A. Yes, sir.
Q. How fast was the train moving on this day when Farrugia attempted to get on it.
A. It was just moving along.
Q. How fast?
A. Not fast. It just went slow, enough for them to get on.
Q. Was the train moving when the rest of you got on it?
A. Yes, sir, just moving along when they were getting on.
Q. And Farrugia was the last man that tried to get on, was he?
A. Yes, sir.
Q. Had not Farrugia told you several times before the accident happened never to get on a moving train?
A. I could not tell anything about it.

76 LOUIS RADAI, called.

(M. Kauffman acted as interpreter.)

(The witness was sworn through the interpreter.)

By Mr. DEMMING:

Q. Where do you live?

A. South Bethlehem.

Q. What do you work at now?

A. Steel work.

Q. Do you know the plaintiff in this case, Antonio Farrugia?

A. Yes, sir.

Q. How long have you known him?

A. A month and a half. I know him a month and a half.

Q. You mean at the time of the accident you knew him a month and a half?

A. Yes.

Q. How long have you known him up to the present time?

A. I did not know him before.

Q. Were you a member of the section gang?

A. Yes, sir.

Q. And Farrugia was your foreman?

A. Yes, sir.

Q. Do you remember the day of the accident, August 12, 1909?

A. Yes, sir.

Q. Your gang was employed in carrying dirt from the excavation at South Bethlehem yards to a place about opposite the Hellertown Station? Is not that so?

77 A. Yes, sir.

Q. How many days before the accident had the dirt train carried dirt down to that point at Hellertown?

A. I don't know.

Q. Do you know how many times the dirt train had been down there? I asked you "days" before. Do you know how many times before the accident?

A. I don't remember how many times.

Q. Was it four or five times or six or seven times? Was it many or few, that the train had been down before the accident?

A. I don't know positively. About twice or three times it was carrying the dirt, the train.

Q. Did you see the accident?

A. Yes, sir.

Q. You had all gone down in the passenger train or passenger coach with the dirt train, had you not? You had all gone down in this passenger coach attached to that dirt train, had you not?

A. No, I was sitting on the dirt car.

Q. I know you were, at the time of the accident. We will let that go. Where were you at the time the accident happened to Farrugia.

A. I was sitting up in the car when the accident happened.

Q. How many cars from the engine were you?

A. About the sixth car from the engine, where I was.

Q. Six? You must have been in the air some place. How
78 many cars were there in this train?
A. About ten or eleven coaches in the train.
Q. You are talking about the train going down. Were not there only five cars in the dirt train at the time?

Mr. MASON: I will admit that.
Mr. DEMMING: I want to get it in his mind.

By Mr. DEMMING:

Q. At the time of the accident? I am not talking about the train going down from the junction. At the time of the accident were not there only five cars in this train when Farrugia got hurt?
A. About five.
Q. Did you see Farrugia when he first tried to get on the train at Hellertown, at the Hellertown station?
A. Yes, I saw him when he got on the car at the depot.
Q. Was the train moving or standing still when Farrugia first tried to get on at Hellertown?

Mr. MASON: I object to the form of that question. He can ask him what the train was doing.
(Question withdrawn.)

By Mr. DEMMING:

Q. What was the train doing when Farrugia tried to get on?
A. It was standing.
Q. How did Farrugia try to get on? How did he try to get on?
A. At the station or at the works?
79 Q. At the Hellertown station, at the time of the accident.
A. He was getting on on the steps.
Q. Of the fifth car?
A. Yes, sir.
Q. What happened to him then? What happened to Farrugia?
A. He was standing on the steps. I saw he was struck at the pole, by a pole.
Q. How far was this pole from where Farrugia—about how many feet was this pole from where Farrugia first tried to get on the train?
A. About ten or twelve feet.
Q. What was Farrugia doing when the pole struck him?
A. He fell down on the ground.
Q. That was after it struck him. Was Farrugia standing still or climbing up on the car when the pole hit him?
A. He was climbing when he was struck.
Q. You have already said he was struck when the pole hit him?
A. Yes.

Cross-examined.

By Mr. MASON:

Q. Had all of the other men gotten on the train when Farrugia was hit?

A. Yes, sir.

Q. When the car on which you were riding in from Bethlehem Station got to Hellertown everybody got out and went to the dirt train?

80 A. Everybody got out of the car, yes.

Q. Did you run for the work train or walk for it?

A. Some of them were running, and some of them were walking.

Q. Was the dirt train moving when you got on it?

A. When he got on it the train was standing still.

Q. Were you one of the first men or one of the last men to get on?

A. I was not the first and I was not the last. I was just getting on with the rest of them.

Q. How fast was this train moving when the last man got up to it?

A. Just started to move very very slowly.

Q. How fast?

A. Just very slow.

Q. And was Farrugia the last man to get on?

A. Yes, sir.

JOHN I. RIEGEL, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Scranton, Pennsylvania.

Q. And what is your business?

A. Civil engineer, consulting work.

Q. You are a graduate of what institution?

A. Lehigh University, 1892.

81 Q. Just tell us briefly what has been your experience, and what roads you have been connected with since then.

A. I was connected with the Lehigh Valley Railroad first after one year's service with the Lehigh Valley Coal Company, and became clearance engineer for the Lehigh Valley in 1894, and kept track of the clearances until I left that road for the New York Central in 1899, where I became engineer of construction in the New York Harbor finally, first of all, chief draftsman, however, and did the clearance work on the New York Central. I was afterwards connected with the D. L. & W. Railroad as division engineer, and with the Delaware & Hudson Company in the railroad department as assistant engineer for six years.

Q. What positions, if any, do you hold at the present time?

A. I am connected with the State Highway Department as assistant engineer.

Q. The State Highway Department of Pennsylvania?

A. The State Highway Department of Pennsylvania, yes.

Q. Are you a practicing engineer, too, aside from that?

A. Nothing except following up my old cases. I have been connected with the Highway Department of the State of Pennsylvania since the 1st of June 1912.

Q. How long were you with the Delaware, Lackawanna & Western Railroad?

A. Two years as division engineer.

Q. As division engineer?

82 A. Yes, sir.

Q. And you were engineer of which division?

A. The Delaware, Lackawanna & Western, was Utica and Syracuse, and the Bloomsburg division also. I had half of the mileage of that road at the time.

Q. You had half of the mileage?

A. Half of the mileage of the Delaware, Lackawanna & Western Railroad.

Q. Do you consider yourself competent to testify with regard to clearances of the Philadelphia & Reading Railway Company?

A. I do, because in connection with my work as clearance engineer for the Lehigh Valley I also consulted with the Reading people over whose North Penn Branch much of our freight of the Lehigh Valley passed at the time and since 1899.

Q. Is there a standard of clearance in the eastern part of this country?

A. Each road has its own standard for transportation clearance, yes, and all roads have a standard virtually for the construction of obstacles or structures alongside of their roadbed.

Q. That includes poles?

A. It includes poles as well as permanent structures, yes.

Q. Does that standard cover sidings as well as the main track?

83 A. It covers all sidings upon which the main line traffic is likely to be shifted in loading or unloading and disposition of materials.

Q. Does it matter whether the sidings are we will say public or provate? Does it matter whether the sidings are public or private?

A. These are matters that are quite material, whether they are private or public. As to what you would mean by public is where the public would have complete access, as I assume your question is. Yes, the clearances are usually less on private sidings, which are constructed to be sidings passing inside of others' properties, through gates and the like, where they have obstructions.

Q. Through gates?

A. Yes.

Q. What is the standard on the Reading Railway, or what was it in 1909? Can you testify to that, of your own personal knowledge?

A. In 1909?

Q. In August 1909. Has your experience been such as to enable you to testify to that?

A. Yes, I followed up the clearances. I was still connected with the Delaware & Hudson Company in 1909, and for some time after this, the date of the accident, and I am competent to testify to clearances, because I followed the car line clearances, and even to-day

I am interested in a transportation company, a coal concern,
84 for whom I am manager.

Q. It is a well-known subject to civil engineers?

A. Yes. There are standards published every three months indicating what the clearances are.

Q. What was the standard of the Philadelphia & Reading Railway Company in 1909?

A. For all bridges and permanent structures, no obstacle to be within seven feet from the center line of the track. For temporary structures, such as poles, piles of ties, that would be located alongside the track, it was five feet from the near side of the rail.

Q. Five feet from the near side of the rail?

A. Yes.

Q. You have heard the testimony in this case, have you not?

A. Yes, what has been submitted this morning.

Q. Is that the standard which would apply to this pole as has been testified to here, the telegraph pole?

A. It would.

Q. And, therefore, of course, the distance as has been testified to here——

Mr. MASON: That is objected to.

Mr. DEMMING: It is a matter for the jury.

Cross-examined.

By Mr. MASON:

Q. As I understand it, the clearance is the distance from the middle of the gauge line to the object on either side of the
85 track? Is that right?

A. No, the clearance properly is the room which is afforded to any vehicles passing over the track.

Q. The clearance means the free space between the outer line of the object passing on the track and the stationary object beyond the track?

A. That is the specific clearance, yes.

Q. But the clearance line you refer to is the measurement from the stationary object outside of the track to the center of the gauge line?

A. Yes, the center of the track, or any point that is indicated specifically.

Q. What did you say was the standard clearance in August 1909?

A. That was seven feet for permanent structures, from the center of the track, and for temporary structures, poles, piles of ties and so forth, five feet from the outside of the rail.

Q. The standard gauge at that time was four feet and five-eighths was it not? What was the standard gauge?

A. Four feet eight and a half inches.

Q. And I understand that where a stationary object such as a pole, would be placed between a main line track, or a siding upon railroad property, which would be called a public siding, that clearance

measurement would be taken from the center of the nearest railroad track to that stationary object?

86 A. It would, yes, the nearest as the most important track.

Q. Therefore, the object must be set back far enough from the nearest rail of the railroad track to permit of the clearance you have described?

A. To properly clear, yes.

Q. And, therefore, if there were a side track built upon the private property of an individual on the opposite side of the stationary object, in fixing the railroad clearance, the nearness of that siding to the stationary object, of course, would not be taken into consideration?

A. Oh, yes, necessarily, that is, where the railroad puts their own traffic over it, or puts her own cars on it.

Q. If the siding is built upon the property of a private individual by that private individual, do you mean to say that the railroad can in any way control the location of the siding?

A. No, I do not assume that they can, but they can control the clearance, they can control the obstruction, they can say its own traffic shall not go over that track, which has been the case, in my experience, as I went over the Reading's own tracks frequently.

Q. But they cannot in any way control the location of the siding when it is on private property?

A. Oh, no.

Q. You have never made an examination of the Thomas Iron Company siding at Hellertown, have you?

87 A. Not before the accident, no, sir. I was familiar with it.

Redirect examination.

By Mr. DEMMING:

Q. You have since the accident?

A. I have since the accident.

Q. What did you ascertain had been done with this track relative to this pole since the accident?

Mr. MASON: That is objected to. I asked him a question, which is very definite, and he answered it very definitely, and it does not permit of any further cross examination on the subject. The question was whether or not he was familiar with the location of the Thomas Iron Company siding at Hellertown at the time of the accident. He said no.

Mr. DEMMING: You asked whether he made an examination of this Hellertown station in connection with the Thomas Iron Company, too.

(The following question and answer were read: "Q. You have never made an examination of the Thomas Iron Company siding at Hellertown, have you? A. Not before the accident, no, sir. I was familiar with it.")

Mr. MASON: That cannot open the door for irrelevant questions.

The COURT: It can hardly open the door to an examination of

this witness as to what the conditions were after the accident. The conditions after the accident are not evidence, are they?

88 Mr. DEMMING: In certain circumstances the Courts have ruled that the conditions after an accident are not evidence. My friend asked the question, and he did not limit it to any time at all. I ask the witness whether he did not make an examination of these tracks after the accident.

The COURT: I think that is the extent to which you can go.

By Mr. DEMMING:

Q. Did you make an examination since the accident?

A. I did, as I had the impression that the Thomas Iron Company track was closer——

Mr. MASON: Do not tell us what your examination was.

By Mr. DEMMING:

Q. I will ask you a question. Do not answer it, because it will be objected to. As a result of that examination, what did you find with reference to this track and the location of the pole after the accident?

Mr. MASON: That is objected to.

The COURT: The objection is sustained.

(Exception noted for plaintiff, by direction of the court.)

By Mr. DEMMING:

Q. From the examination you made of these sidings at the Hellertown Station, is it your opinion as a railroad engineer that these are sidings which should observe the standard with regard

89 to clearance of objects?

Mr. MASON: That is objected to.

The COURT: He has already testified as to the clearance rules, as far as obstacles are concerned, applying to sidings.

Mr. DEMMING: I know, and so far as I am concerned I am satisfied with that testimony. Now I thought perhaps my friend had made it a little cloudy by asking him certain questions with regard to public and private sidings.

The COURT: You are not asking this question at the request of Mr. Mason, I am sure.

Mr. MASON: I do not think it is for my benefit.

Mr. DEMMING: I want to make it clear in the minds of the jury that these sidings are such sidings as should observe the standard.

The COURT: He could not determine that from an examination.

Mr. MASON: It would be a speculative opinion. His testimony is very clear; if it is a private siding, there is no control over it by the railroad, so far as the location is concerned.

The COURT: But there is control over it to the extent that the railroad company prohibits trains running over the siding, because it is not properly fitted.

Mr. MASON: They can do that, yes. That is his testimony.

90 Mr. DEMMING: And they sent their own man down here on this siding.

The COURT: I do not think the question is admissible. The examination would not determine whether it was a private siding or a public siding.

(Question withdrawn.)

By Mr. DEMMING:

Q. I want to ask you one other question. The object, of course, of this clearance is on account of the overhang of the car?

Mr. MASON: That is what he said.

A. Yes, sir, the overhang over the rail, and so as to avoid obstruction of passing trains, and the men climbing upon and about the cars.

JOHN MORGAN, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?
A. South Bethlehem.
Q. You say you live in South Bethlehem?
A. Yes, sir.
Q. What do you do now?
A. Work.
Q. Who do you work for?
A. For the Steel Works.
Q. In South Bethlehem?
91 A. Yes.
Q. Do yon know this plaintiff, Antonio Farrugia?
A. Yes.
Q. How long have you known him?
A. I know him two or three years or four or five years ago.
Q. Were you a member of his section gang at the time he met with the accident?
A. Yes, sir.
Q. At that time you were in the gang of which Farrugia was the foreman?
A. Yes.
Q. Taking dirt from the Bethlehem yards, the South Bethlehem yards, down to the Hellertown Station?
A. Yes, sir, the Hellertown Station.
Q. How many men were there in that gang?
A. About thirty-one.
Q. Do you remember the day of the accident on the 12th of August 1909?
A. Yes.
Q. What time of the day did the accident happen?
A. About eight o'clock in the morning.
Q. Eight o'clock in the morning?
A. Yes.
Q. How many times before that, or first I will ask you how many

days, for how many days had you been taking dirt down there before the accident?

92 A. Three or four times. Three or four days, something like that.

Q. How many times a day would you go down?

A. I don't know. Some days we would go to one place, and another day we would go to another place, and some days we would go to another place. I don't know how many times we would go there.

Q. You took dirt to different places and dumped it?

A. Sure, to different places.

Q. You would not always take the dirt down to Hellertown to dump it?

A. No, sir.

Q. At the time you went down to Hellertown that morning you were all in the passenger coach, were you not?

A. Yes, sir.

Q. When you got down to Hellertown they uncoupled the passenger coach from the rest of the train, did they not?

A. Yes.

Q. Then you all got out and walked down alongside of the track?

A. Yes.

Q. And took your place on the train?

A. Yes, sir.

Q. At that time the dirt train was standing about opposite the station, was it?

A. Yes, it was standing right opposite the station.

Q. Just opposite the station?

A. Yes.

93 Q. Was it standing on the farthest track from the station?

A. The last track.

Q. That is, the fourth track?

A. Yes.

Q. In front of the station?

A. Yes.

Q. How many cars were there in the dirt train?

A. Five.

Q. Which car did you get on?

A. The fourth car from the front.

Q. That is, the car next to the engine?

A. No, the last car.

Q. The last car?

A. Yes.

Q. The fifth car from the engine?

A. Yes.

Q. Is that the car that Farrugia tried to get on?

A. Yes.

Q. Did you see him when he tried to get on the train?

A. Yes, sir.

Q. What was the train doing?

A. Standing still.

Q. What was the train doing when Farrugia tried to get on?
A. It just started to go ahead when Tony was getting on.
Q. It just started to go ahead when he started to get on?
A. Yes.
Q. You mean by that that it just started to go?
94 A. Just started to go.
Q. When the train first started to go, where was he? Where was this man?
A. He was on the ground.
Q. And at what part of the car was he?
A. In the back step.
Q. The back step?
A. Yes.
Q. Had he hold yet of the grab iron when the engine started?
A. No, he just tried. He tried to grab hold.
Q. Did you see the pole strike him?
A. I saw the pole strike him, yes, sir.
Q. You saw the pole strike him?
A. Yes, sir.
Q. Was it the telegraph pole or the signal pole that struck him?
A. The telegraph pole.
Q. The first pole that he struck was the signal pole—the first pole that he passed was the signal pole?
A. Yes.
Q. Then the telegraph pole was just the other side of that?
A. Yes.
Q. How far was he standing from the signal pole we will say when he first tried to get on the train? How many feet?
95 A. The signal pole?
Q. From the signal pole.
A. About ten or eleven feet.
Q. You think he was standing that close to it?
A. Yes, sir.
Q. How far is the telegraph pole from the signal pole?
A. About ten feet.
Q. When the telegraph pole hit Farrugia what was he doing?
A. He was trying to get on the car.
Q. Trying to get up?
A. Yes.
Q. And after that he was knocked down under the train, was he?
A. Yes.
Q. Is that all you know about it?
A. That is all I know.
Q. You are not related to him in any way?
A. No.
Q. And have no interest in this case?
A. No.

Cross-examined.

By Mr. MASON:

Q. You were in the dirt car that Farrugia tried to get up on, are you not?
A. Yes, sir.
Q. And had all the other men gotten up into the train when he tried to get on?
96 A. Yes, all of them.
Q. I understand that he was standing on the ground when the train started?
A. Yes.
Q. And as the train started he made a grab for the grab iron?
A. Yes.
Q. And was trying to get up into the car that you were in?
A. Yes.
Q. When the pole hit him?
A. Yes, sir.

ANTONIO FARRUGIA, recalled.

By Mr. DEMMING:

Q. Why did you get on the train last?
A. I did not get on last. I got on at the same time everybody got on.
Q. When you tried to get on the train all your men had gotten on, had they not?
A. Yes.
Q. Why did you try to get on last of all?
A. I was standing on the front car. I got on the steps and the engine moved, of course.
Q. I understand that, but I ask you now why did you let all your men get on the train before you got on?
A. I ain't got any more time to get on it before.
97 Q. You were the foreman of these men?
A. Yes, sir.
Q. Did you tell them to get on the train?
A. Every man, there is no use to tell him, every man got himself on the train.
Q. They knew what was their duty?
A. They know that.
Q. We want to know why you got on the train last. Why were you the last man to get on?
A. I left every man—after he got on, I got on.
Q. You looked yourself and saw that every man was on, then you got on?
A. Yes.

Mrs. Rose Merino, having been duly sworn, was examined and testified as follows:

By Mr. Demming:

Q. You are the daughter of the plaintiff?
A. Yes, sir.
Q. You are married?
A. Yes, sir.
Q. And you live at 425 East Fourth Street——
A. No, I don't live at home any more.
Q. You live in South Bethlehem?
A. Yes.
Q. You have a home of your own?
A. Yes, sir.

98 Q. Will you please tell us before this accident to your father what was the condition of his health?
A. He was always in the best of health. He was a well man.
Q. Did he ever require any medical attention?
A. Never.
Q. Before?
A. He was never sick, not that I remember.
Q. After he met with this accident, what has been his condition of health?
A. He has never been a well man since. Never. He always had some trouble of some kind.
Q. When did you leave him?
A. Just two years ago.
Q. Two years ago?
A. Yes.
Q. Do you see him frequently?
A. Yes, certainly.
Q. I mean, have you been there every day, where he lives?
A. Not every day, but two or three times a week, I am always down, or he either comes up.
Q. You see him very often?
A. Yes.
Q. What seems to be the trouble with him since the accident?
A. He was so used to working, and now he does not do anything, and his stomach is in disorder all the time.

99 Q. Does he complain of his stump?
A. Yes, he also complains of his hurt.
Q. You know he has tried to work at different things?
A. Yes, sir.
Q. Has he been able to do it?
A. No, he cannot sit. He tried to do shoemaking at one time, but he cannot sit long enough, he has such pain.

(No cross-examination.)

Mr. Demming: I have a Philadelphia physician whom I have had examine this man to ascertain whether or not what he says is true about his not being able to use an artificial leg. This physician

told me that is true, that the leg is amputated too near the hip. He was here yesterday, and for several days, but he has a very important operation this morning. He thought he would get here at half past ten or eleven o'clock. He told me he would get here just as soon as he could. If he comes in later I would like to have the privilege of putting him on the stand.

I would like to offer in evidence these photographs which have been identified and marked.

Plaintiff closes.

Counsel for defendant moved for a non-suit.

100 (Motion argued.)

At one o'clock p. m. Court took a recess until 2 o'clock p. m.

2 O'CLOCK p. m.

Present: Parties as before noted.

The COURT: Gentlemen of the Jury, this action is brought under an Act which makes railroad companies which are interstate carriers liable for injuries to employees while engaged in inter-state commerce. In this case there has been no evidence that the plaintiff was engaged in interstate commerce at the time of the accident. He was engaged in hauling dirt, with a gang of men, who were levelling some ground which was to be used to make additional tracks. Under the law as laid down by the Supreme Court that is not sufficient to make out an engagement by the plaintiff in interstate commerce. Consequently, it becomes my duty in the case to enter a non-suit, and you are discharged from further consideration of this case.

Non-suit granted.

101 And thereupon, the counsel for the said plaintiff did then and there except to the aforesaid entering of a non-suit and opinion of the said court and refusal to take off said non-suit; and inasmuch as the entering of said non-suit and opinion, so excepted to, do not appear upon the record:

The said counsel for the said plaintiff did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the plaintiff did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this twenty-eighth day of November, 1913.

J. W. THOMPSON, *Judge*. [L. S.]

102 In the District Court of the United States for the Eastern District of Pennsylvania, October Session, 1910.

No. 1210.

ANTHONY FARRUGIA
vs.
PHILADELPHIA & READING RAILWAY COMPANY.

(Endorsed: Order of Court refusing motion to take off non-suit; filed November 28, 1913.)

Before Thompson, J.

And now to wit this 28th day of November, 1913, it is ordered that the motion to take off non-suit be refused.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

103 In the District Court of the United States for the Eastern District of Pennsylvania, October Session, 1910.

No. 1210.

ANTHONY FARRUGIA
vs.
PHILADELPHIA AND READING RAILWAY COMPANY.

(Endorsed: Order allowing exception; filed November 28, 1913.)

And now, this, the 28th day of November, 1913, the plaintiff, Anthony Farrugia, by his attorney, George Demming, Esq., hereby excepts to the refusal of the learned court to take off the judgment of non-suit entered by it in the above case.

Exception allowed.

J. W. THOMPSON, *Judge.* [L. S.]

104 In the District Court of the United States for the Eastern District of Pennsylvania, October Session, 1910.

No. 1210.

ANTHONY FARRUGIA
vs.
PHILADELPHIA AND READING RAILWAY COMPANY.

(Endorsed: Præcipe for entry of judgment and Judgment; filed December 4, 1913.)

To Clerk of above court:

Enter judgment in favor of the defendant in above case.

WM. CLARKE MASON,
Counsel for Defendant.

Judgment.

Before Thompson, J.

And now to wit this 4th day of December, 1913, in accordance with præcipe filed, judgment is hereby entered in favor of the defendant and against the plaintiff in the above entitled case.

Attest:
LEO A. LILLY,
Deputy Clerk.

105 In the District Court of the United States, Succeeding the United States Circuit Court for the Eastern District of Pennsylvania, October Sessions, 1910.

No. 1210.

ANTHONY FARRUGIA
vs.
PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania.

Certificate of Judge that the Question of the Jurisdiction of the Court is in Issue in This Cause, and Certifying said Question of Jurisdiction to the Supreme Court of the United States.

(Endorsed: Certificate of Jurisdictional Question Involved; filed November 28, 1913.)

This cause, having been duly put at issue, came on to be tried before this Court and Jury duly impaneled, on November 19 and 20, 1913, and witnesses and evidence were duly presented on behalf of the plaintiff. Whereupon, at the conclusion of plaintiff's case, this Court directed that a non-suit be entered against plaintiff in the case, and that the Jury be dismissed from further consideration of the case, on the sole ground that this Court could not take jurisdiction of the case and the Jury could not be allowed to consider the case because the evidence produced at the said trial of the case did not disclose that plaintiff, at the time of the happening of the accident by which he received the injuries complained of, was engaged in Interstate Commerce. Accordingly, a non-suit was entered by this Court, said case was removed from the consideration of the Jury, counsel for plaintiff entered a rule to take off the non-suit, which rule, in due course, was discharged, and counsel for
106 plaintiff was allowed an exception to the refusal of this Court to take off said non-suit.

This Court, therefore, hereby certifies to the Supreme Court of the United States solely the question as to whether this Court has

jurisdiction in the present cause on the ground of plaintiff being engaged in Interstate Commerce at the time of the occurrence of the accident to him while in the employ of the defendant railroad company on or about August 12, 1909, and whether, as shown by the entire record and by the evidence contained in the bill of exceptions, plaintiff, at the time of the occurrence of said accident to him on or about August 12, 1909, was engaged in Interstate Commerce within the meaning and language of the Railroad Employers' Liability Acts of Congress, approved April 22, 1908 and April 5, 1910.

This certificate is made conformably to the Act of Congress of March 3, 1891, Chapter 517, and, upon an appeal being taken by the plaintiff to the Supreme Court of the United States, all the pleadings, the bill of exceptions, the motion to take off the non-suit, the refusal of this Court to take off the non-suit, the exception granted plaintiff for the refusal of this Court to take off the non-suit, the final judgment entered in the case, and this certificate, will be certified and sent up as part of the proceedings.

J. W. THOMPSON, *Judge.*

Approved as to form.
WM. CLARKE MASON.

107 In the Supreme Court of the United States.

ANTHONY FARRUGIA, Plaintiff in Error and Plaintiff Below,
vs.
PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, Defendant in Error and Defendant Below.

(Endorsed: Filed December 12, 1913.)

Assignments of Error.

And now, comes Anthony Farrugia, plaintiff in error, and makes and files these, his assignments of error:

1. The District Court of the United States for the Eastern District of Pennsylvania erred in directing the entry of a non-suit at the trial of the above case.

2. The District Court of the United States for the Eastern District of Pennsylvania erred in refusing to take off the judgment of non-suit entered by it in the above case.

3. The District Court of the United States for the Eastern District of Pennsylvania erred in refusing to entertain jurisdiction of the above case on the ground that plaintiff in error was not engaged in interstate commerce at the time of the happening of the accident or occurrence, of which plaintiff in error complained, and in which occurrence or accident he received his injury.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

108 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of Docket Entries, Writ of Error, Statement of Claim, Amendment to Statement of Claim, Plea, Bill of Exceptions, order of Court refusing motion to take off non-suit, Order Allowing Exception, Præcipe for Judgment—Judgment, Certificate as to Jurisdiction, Assignments of Error, in the case of Anthony Farrugia v. Philadelphia and Reading Railway Company, No. 1210, October Session, 1910, now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 20th day of December in the year of our Lord one thousand, nine hundred and thirteen and in the one hundred and 38th year of the Independence of the United States.

[Seal of the District Court of the United States, E. D. Penna.]

WILLIAM W. CRAIG,
Clerk District Court U. S.,
By GEORGE BRODBECK,
Deputy Clerk.

Endorsed on cover: File No. 23,974. E. Pennsylvania D. C. U. S. Term No. 823. Anthony Farrugia, plaintiff in error, vs. Philadelphia & Reading Railway Company. Filed December 22d, 1913. File No. 23,974.

/8

FILED
JAN 24 1914
JAMES D. MAHER
CLERK

No. 823. **October Term, 1913.**

IN THE

Supreme Court of the United States.

ANTHONY FARRUGIA,

Plaintiff in Error and Plaintiff Below,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania,

Defendant in Error and Defendant Below.

Writ of Error to District Court of the United States for the Eastern District of Pennsylvania.

Brief for Plaintiff in Error.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

International, 236 Chestnut St.

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ALPHABETICAL LIST OF ALL CASES REFFERED TO, TOGETHER WITH REFERENCES TO PAGES WHERE CITED.

IN THE

Supreme Court of the United States.

October Term, 1913. No. **823.**

ANTHONY FARRUGIA,
Plaintiff in Error and Plaintiff Below,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, A CORPORATION OF THE STATE OF PENNSYLVANIA,
Defendant in Error and Defendant Below.

WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

An action in trespass brought in the Circuit Court of the United States (now District Court), for the Eastern District of Pennsylvania, under the Railroad Employees' Liability Acts of Congress of 1908 and 1910, by a railroad employee for personal injuries to himself received while in the employ of a railroad company engaged at the time of the injury in interstate commerce and when the employee (according to his contention) was similarly engaged.

STATEMENT OF THE CASE.

The plaintiff in error, Anthony Farrugia, had been employed for some time by defendant in error, the Philadelphia and Reading Railway Company. He is a native of Italy, but has been in this country twenty-seven years, and has been naturalized twenty years. He began working for defendant in error as a laborer or section hand, but later was promoted to the position of foreman over a gang of section men.

Defendant in error, the Philadelphia and Reading Railway Company, is admittedly generally engaged in interstate as well as intrastate commerce.

On August 12, 1909, plaintiff in error and his gang of men were engaged in loading dirt on the flat cars of a so-called "gravel train," belonging to defendant in error, taking their loaded train down defendant in error's tracks for a short distance and then dumping it alongside the right of way. The dirt was obtained by cutting away an embankment on property belonging to defendant in error at the side of what was known as the South Bethlehem yard of the Philadelphia and Reading Railway Company. The dirt was taken away for the purpose of leveling the ground and affording space for the laying of additional tracks in this yard, thereby enlarging the yard. These tracks were subsequently laid. Before this time, at this time, and afterwards, this yard was used by defendant in error for the storage and switching of cars bearing interstate traffic as well as intrastate; and on the tracks laid on the space so leveled cars carrying interstate traffic afterwards stood and were and are hauled.

Among other places this dirt was dumped by

plaintiff in error and his gang at a certain point along the right of way of defendant in error's road in order to make a fill and afford additional roadbed for tracks of the Thomas Iron Company, all of whose traffic came over defendant in error's road and part of which traffic was daily interstate in character. The load of dirt plaintiff in error and his men had charge of and were about to dump at the time he met with his accident was used to make roadbed on and over which was placed the then existing track of the Thomas Iron Company leading from defendant in error's tracks, and over which tracks interstate commerce each day was hauled.

On the morning of August 12, 1909, plaintiff in error and his gang of men had taken the load of dirt from the South Bethlehem yard on a train of five loaded flat cars and a passenger car down to the place of dumping directly opposite Hellertown station on defendant in error's railroad. At this place the engine and passenger coach were detached, and a smaller engine coupled on for the purpose of pulling the cars to the exact place of unloading. Plaintiff in error and his men left the passenger coach, distributed themselves along the side of the train, and clambered on the cars for the purpose of unloading the dirt. Plaintiff in error got his men on the train first and then started to get on himself. Before he began to get on, or just as he was in the act of getting on the stirrup or step, the train started, and before he could get clear of the side of the car and get on the car itself, he came violently in contact with a telegraph pole placed in too close proximity to the track, was precipitated from his position, thrown underneath the train and his right leg was severed between the hip and knee.

The learned trial court below held that, under these circumstances, plaintiff in error was not engaged in interstate commerce, that the jurisdiction of

the Federal Court did not apply, and he could not maintain his action under the Railroad Employers' Liability Acts of Congress of 1908 and 1910.

Previous to this action plaintiff in error had brought a suit under the common law in the state courts of Pennsylvania. At the trial in Easton the result was so apparent that he suffered a voluntary nonsuit. He then began two suits in the United States District Court for the Eastern District of Pennsylvania (at that time Circuit Court)—one under the common law, the other under the Acts of Congress of 1908 and 1910. The common law action came to trial first, and resulted in a compulsory nonsuit on the ground of contributory negligence. Plaintiff in error then pushed this present action founded on the liability imposed by the Act of Congress. While at the time of beginning the suit plaintiff in error was residing in New Jersey, at the trial it developed that he was a citizen of Pennsylvania, the same domicile as the defendant in error, and that the sole ground for seeking the Federal jurisdiction was the fact that the action was based upon the Acts of Congress aforesaid.

ASSIGNMENTS OF ERROR.

1. The District Court of the United States for the Eastern District of Pennsylvania, erred in directing the entry of a nonsuit at the trial of the above case.

2. The District Court of the United States for the Eastern District of Pennsylvania, erred in refusing to take off the judgment for nonsuit entered by it in the above case.

3. The District Court of the United States for the Eastern District of Pennsylvania, erred in refusing to entertain jurisdiction of the above case on the ground that plaintiff in error was not engaged in interstate commerce at the time of the happening of the accident or occurrence, of which plaintiff in error complained, and in which occurrence or accident he received his injury.

ARGUMENT.

As the Acts of Congress under which this suit is brought are so recent and the decisions of this court interpreting the same are so limited, comparatively little can be said by way of pointing to precedent.

In refusing to assume jurisdiction of the case and deciding plaintiff in error was not engaged in interstate commerce at the time he met with his injury, the lower court seemed to have been largely moved by the following language in the decision of Pederson vs. Del., Lack. & Western R. R. Co., 229 U. S. 146 (1913):

> "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The question, therefore, to a great extent, is, What did this Court mean by these words?

The contention of plaintiff in error is that the true interpretation of this language is that it refers to the absolute and outside construction of tracks and the parts entering therein,—the rails, bolts, fish-plates, ties and spikes; of bridges,—the iron and steel, girders, bars, beams, bolts and rivets, entering into the

construction of bridges; and of engines and cars and their many parts and materials. That is to say, it means the making of all these different parts and agencies entering into the construction, the maintenance and the running of a modern railroad at their respective mills, shops and factories, separate, apart and away from the actual railroad itself and its various and directly connected activities. Also, this language means, according to the understanding of plaintiff in error, the construction of a brand new railroad and its parts, not yet in real operation as an interstate carrier.

But when one comes to consider any agency, instrument, vehicle or class of work done by, or on behalf of, such interstate carrier, using its facilities so to do, on and at the scene of its daily and hourly activities, and modifying, affecting, increasing and enhancing directly and clearly its abilities for handling and disposing of such interstate commerce, then this becomes, necessarily and by its very nature, so intimately associated with its interstate commerce as to be practically indivisible and indistinguishable therefrom.

It is submitted that the work of enlarging a railroad yard of an interstate carrier,—an old and going concern,—using its cars and engines and other well-known instrumentalities so to do,—thereby adding to its facilities and efficiency, comes within the category and definition of this Court of interstate commerce.

In the present case it must be remarked that the facts are as follows: Plaintiff in error and his gang of men, all employed by the defendant in error railroad company, secured dirt from the excavation of an embankment at the side of the company's yard, which embankment was the railroad's property and which yard at the time was in active operation. The taking of this dirt leveled the place from where it was taken,

the dirt was removed for this purpose, and on this space was built additional tracks. On these tracks stood and were hauled cars containing interstate traffic. Before the time of excavation, at the time of excavation and afterwards, this yard contained cars bearing interstate traffic.

Plaintiff in error and his men placed this dirt on cars furnished by and belonging to defendant in error. They were then propelled by a locomotive, also belonging to defendant in error, down and on the regular tracks and right of way of defendant a distance of four or five miles to a regular station on defendant in error's road. There the dirt was being dumped, or about to be dumped, at the time plaintiff in error met with his accident, in order to afford additional and required roadbed for a side track alongside of defendant in error's through tracks, and over which side track interstate commerce passed every day from defendant in error's road. Sometimes and on previous occasions the excavated dirt had been dumped at other places alongside defendant in error's right of way, but on this particular occasion it was dumped at this special spot.

In the decision of

> Pederson vs. Del., Lack. & Western R. R. Co., supra,

this Court says:

> "We are of opinion that the work of keeping such instrumentalities in a proper state of *repair* while thus used is so closely related to such commerce (interstate) as to be in practice and legal contemplation a part of it."

Whether the dumping of dirt alongside a track which already carries interstate commerce, in order to afford additional roadbed and support for it, is

"repair" or "construction," is a debatable question. Plaintiff in error submits that under the circumstances of this case it partakes more of the nature of "repair" than "construction."

The main subject in this case, however, seems to be, whether the work of a railroad company on and about one of its yards "can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole."

In other words, where a railroad company is engaged in interstate commerce, and has constructed and employs a yard in carrying on that commerce, can any work done on or about that yard, even in the way of adding to the facilities of that yard, be said to be separable from the general interstate character of the work impressed on that yard? Plaintiff in error contends it cannot.

This Court has quoted in one or two of its decisions, with approval, the case of

Lamphere vs. Oregon Ry. & Navigation Co., 196 Fed. 336 (1912).

Among other things, this decision says:

> "The test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, What is its effect upon interstate commerce? Does it have the effect to hinder, delay or interfere with such commerce?"

In

Mondou vs. New York, N. H. & H. R. R. Co., 223 U. S. 1 (1912),

this Court says, in affirming the power of Congress over commerce between the states, and its application

to every possible instrument and agent by which such commerce is or may be carried on:

> "But, of course, it does not extend to any other matter or thing which does not have a real or substantial relation to some part of such commerce."

and

> "Subject always to the limitations prescribed in the Constitution and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged."

Again, in

> Southern R. R. Co. vs. United States, 222 U. S. 20 (1911),

this Court says:

> "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case the cars in which they are carried are frequently *commingled in the same train and in the switching and other movements at terminals.* Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and *the situation is much the same with trainmen, switchmen and like employees, for they usually, if not necessarily, have to do with both classes of traffic.* Besides, *the several trains on the same railroad are not independent in point of movement or safety, but are interdependent;* for whatever brings delay or disaster to one, or results in disabling one of its operations, is calculated to impede the progress and imperil the safety of the other train. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others."

In the case of

St. Louis, San Francisco & Texas Railway Co. vs. Seale, 229 U. S. 156 (1913),

it is said:

> "The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains, or for unloading and delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."

Plaintiff in error was employed as a foreman of a gang of section hands by defendant in error, an interstate road. At one time he and his men would be engaged in working on the ballast, ties and rails of a through track, and their work would undoubtedly be stamped as interstate in character. If, at another time, possibly an hour afterwards, or five minutes afterwards, they were working at taking away dirt from an embankment belonging to defendant in error so that tracks could be extended, or new tracks laid, and dumping that dirt so that additional roadbed should be obtained, can it be said that now their work is not of the interstate class? At one moment they are under the protection of the broad principles of the Federal law; the next, they step within the narrow confines of a state act, and thus they go, back and forth, as they toil.

Has not this work a real, intimate and substantial connection with and effect on the interstate commerce of the railroad by which these men are employed, and its facilities and means of disposing of and dealing with such commerce?

Are safety devices, trains, cars and engines of greater importance than the men who use and operate them? If a few packages in a car give the car and its whole load an interstate stamp; if one or two cars bearing interstate traffic in a train make the entire train interstate in character; if the interstate impress on a car follows it to the remotest recesses of the yard where it may finally lodge; do not the interstate duties of an employee for an interstate carrier give him an interstate stamp and follow him wherever he goes while working for that employer, and are they not sufficient to cover all his work? His interstate duties are commingled with his other work. Is it possible, or practicable or desirable to separate them or distinguish them? Always presupposing, of course, that this work is done on or about the place of the interstate commerce carrier's activities and place of actual carriage, and not in a distant construction and equipment mill, shop, or factory, not owned or controlled by the carrier.

Again applying this principle to the functions of the yard itself, can anything done generally on or about that yard be said to be separable and divisible into interstate and intrastate commerce? Is not the interstate work of that yard so commingled with all the other work as to give it all an interstate character, if the occasion requires?

The objection might be made, that in the present instance it was work of new construction purely, because on the ground made level by the plaintiff in error and his gang of men other and additional tracks were laid, and that therefore this was in no sense "repair" of the old yard or work done on or in the old yard. Let us see!

The business of this interstate carrier increases and gets to the point of congestion so far as regards this particular yard. It is greatly handicapped in handling and caring for its cars in this yard. It requires greater facilities. The efficiency of the yard has been seriously impaired and partly destroyed. Defendant in error has not enough room. It cannot take care of its rolling stock. Conditions are not sound. Deterioration, if not dilapidation, of service has set in.

At this juncture defendant in error plans improvements and extensions and puts plaintiff in error and the men under him at work in clearing the ground for the purpose of enabling it to extend some tracks and put in other tracks.

The yard is thereby restored to its former state of efficient and sound working. It has again become a good, sound, serviceable and dependable yard.

The noun "repair" has been well defined to mean, "restoration to a sound or good state, the act of renewing or mending after injury or partial destruction."

Were not plaintiff in error and his gang of men engaged in renewing, repairing and restoring this railroad yard to a sound and proper basis? Was plaintiff in error not just as much employed in the act of making a repair as Pederson, when he carried the bolt along the track for the purpose of repairing the weakened girder?

Both acts had a real and intimate connection with a railroad's ability to safely and properly handle its interstate commerce.

This Court has said that a clerk employed in making a record of the seals on doors of cars used by both

interstate and intrastate traffic in a railroad yard is engaged in interstate commerce.

St. Louis, San Francisco & Texas Rwy. Co. vs. Seale, supra.

That a dining car standing on a side track, waiting to be placed in an interstate train is charged as being employed in interstate commerce.

Johnson vs. Southern Pacific Co., 196 U. S. 1.

And that a fireman piloting the way for a locomotive, proceeding from the round house to the main track for the purpose of being attached to a train carrying some interstate shipments was engaged in interstate commerce.

Norfolk & Western Railway Co. vs. Earnest, 229 U. S. 114 (1913).

It is respectfully submitted that the present plaintiff in error employed in work which "repaired," restored and put in a state of sound and needed efficiency a railroad yard of an interstate carrier was likewise engaged in interstate commerce, that this question should be decided in the affirmative, and that the District Court should be accordingly directed to assume jurisdiction of the case.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

No. 823. October Term, 1913.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

ANTHONY FARRUGIA
Plaintiff in Error and Plaintiff Below

vs.

PHILADELPHIA & READING RAILWAY COMPANY,
A Corporation of the State of Pennsylvania
Defendant in Error and Defendant Below

Writ of Error to District Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR DEFENDANT IN ERROR

WM. CLARKE MASON,
CHARLES HEEBNER,
Counsel for Defendant in Error.

T. S. DAVIS & SONS, PRINTERS, 308-310 RACE ST., PHILA.

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IN THE

Supreme Court of the United States

October Term, 1913. No. 823.

Anthony Farrugia

Plaintiff in Error and Plaintiff below

vs.

Philadelphia & Reading Railway Company

a corporation of the State of Pennsylvania

Defendant in error and Defendant below

STATEMENT OF QUESTION INVOLVED.

The record presents for the consideration of this Court the sole question whether the pleadings and proof produced in the District Court by the plaintiff in error show an engagement in interstate commerce sufficient to sustain a cause of action under the Act of Congress of April 22, 1908, and the supplements thereto.

The evidence of employment produced by the plaintiff to show interstate service discloses the fact that on August 12, 1909, when the accident

occurred, plaintiff was foreman of a gang engaged in excavating, leveling and widening ground upon which tracks, sidings and switches were subsequently constructed as an addition to the railroad yard of the defendant company located at South Bethlehem, Pa. The necessary excavation was finished, and the laying of the additional tracks, sidings and switches began November 9, 1911, more than two years after the accident, and the entire yard was completed for use in both interstate and intrastate commerce December 31, 1912.

ARGUMENT.

The pleadings in this case upon which the plaintiff bases his cause of action include a statement of claim filed December 10, 1910, in which the averment concerning the employment of the plaintiff is as follows (Record, p. 3):

> "On and about the 12th day of August, 1909, said plaintiff was employed by said defendant company as a laborer or a laborer's boss in, on and about a gravel or dirt train, belonging to and controlled and operated by defendant in and near the Borough of South Bethlehem, Pennsylvania."

There is no averment in the statement that the service was rendered in the course of employment concerning interstate commerce.

This statement of the plaintiff's cause of action is therefore insufficient to establish a right under the Employers' Liability Act, which requires that at the time of the injury the employee as well as the employer shall be engaged in interstate commerce.

Mondou v. Railroad Co., 223 U. S. 1.

Pederson v. Railroad Co., 229 U. S. 146.

Before trial, more than three years subsequent to the accident which caused the plaintiff's injury, to

wit, October 4, 1912, the plaintiff filed an amendment to his statement of claim, in which he averred the following (Record, pp. 4, 5):

> "The plaintiff, Anthony Farrugia, brings this action under the provisions of, and by reason of the cause of action given by, the Acts of Congress known as an Act relating to the liability of common carriers by railroads to their employees in certain cases, approved April 22, 1908, and its amendment of April 5, 1910. And at the time of the occurrence, grievance and accident hereinafter set forth and complained of by plaintiff, said defendant was engaged, under the meaning and application of said Acts of Congress, in interstate and foreign commerce, and plaintiff, likewise, as defendant's servant and employee, was engaged similarly in interstate and foreign commerce."

If this averment be assumed, for the sake of argument, to be an averment of fact and not a mere conclusion of law, as there are no statements showing that the service which was being rendered at the time of the accident was of an interstate character, there is still an objection to the pleadings for the reason that the amendment changing the cause of action from a common law liability to a claim under the Employers' Liability Act was filed after the time within which suit could be brought under the terms of the Act of Congress.

Act of April 22, 1908, section 6, provides:

> "That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

In a case where the statute of limitations has run, there cannot be set up by amendment a new cause of action for which a suit could not *then* be instituted by original process.

It is for that reason, if for no other, that the judgment of the learned Court below in granting a nonsuit is sustainable because the amendment, which introduces a new cause of action in changing from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or an exceptional right, was improperly allowed, and without the amendment the pleadings are insufficient.

Allen v. Railroad Co., 229 Pa. 97.

Mr. Justice Mestrezat (p. 102):

> "The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce or that the defendant's cars were equipped with couplers in violation of the Act of Congress. Proof of the existence

of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action: Wabash R. R. Co. v. Bhymer, 214 Ill. 579. It is apparent that without this amendment the Act of Congress could have had no place in the case and could not have been invoked to deprive the company of its defense that the plaintiff assumed the risks or dangers of his employment. If, however, all the facts necessary to bring the case within the Act of Congress had been included in the original statement, it would have been insufficient as a statement under the Act without a reference to the statute: Bolton v. Georgia Pacific Ry. Co., 83 Ga. 659. It is also true that if, as claimed by the plaintiff, all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be a change or departure from the original statement, not from fact to fact, but from law to law, from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case, the plaintiff bases his right of recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original cause of action: Union Pacific Ry. Co. v. Wyler, 158, U. S. 285; Boston & Maine R. R. Co. v. Hurd, 108. Fed. Repr. 116."

Union Pacific Ry. Co. v. Wyler, 158 U. S. 285. Mr. Justice White (p. 295):

> "A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not per se a charge of negligence on the part of the fellow servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petititon proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. . . . It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recovery were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas stat-

> ute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right."

Brinkmeier v. Railway Co., 224 U. S. 268.

It is not the failure of the plaintiff to set forth the provisions of the Employers' Liability Act of which the defendant in error complains, but the complete silence of the original statement concerning the character of the plaintiff's employment.

The cause of action pleaded in the original statement is a common law right, containing no averment that the plaintiff in error was engaged in interstate commerce at the time of his injury. The amendment therefore which contains a reference to the Acts of Congress and also the conclusion that the plaintiff was engaged in interstate commerce comes too late to cure the original defect. There is no consolation to be found by the plaintiff in the decision of this Court in the case of **Missouri &c. Railway Co., v. Wulf**, 226 U. S. 570, for the reason that the opinion delivered by Mr. Justice Pitney clearly points out that the necessary averment of fact was contained in the original petition:

> "It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce."

The pleadings therefore in the case at bar are insufficient in that they fail to meet the requirements for a cause of action contemplated by the Federal Employers' Liability Act.

The record in this case produced at the trial in support of the plaintiff's claim that he was engaged in interstate commerce at the time of his injury fails to prove the fact of such employment, and therefore even though the pleadings did aver a cause of action, the proofs are insufficient to sustain a recovery.

The evidence of the character of the plaintiff's service is contained in the stipulation of counsel and the oral testimony of the plaintiff and his witnesses as follows:

Stipulation (Record, pp. 7-8):

> "That the plaintiff was employed by the Phila. and Reading Railway Company, and was employed by them as foreman of a gang

of laborers engaged at the time of the accident in removing dirt, placing the same upon open cars at one point, and, after the cars had been removed, drawn and shifted, taking the same from said cars at another point. That the accident to plaintiff occurred on August 12, 1909, and that this dirt was being removed from the property of the Phila. and Reading Railway Company, had been in process of being so removed for some time prior to said date, and was being so removed as a necessary part of the excavation, leveling and widening of ground for the construction of additional tracks, sidings and switches of the railroad yard of the said Phila. and Reading Railway Company, located at South Bethlehem, Pa. That the necessary excavation was finished, and the laying of said additional tracks, sidings and switches was begun on November 9th, 1911, and the whole addition to said yard was completed on December 31, 1912.

"That this addition to the said railroad yard was planned for the purpose of enlarging the capacity of said yard for the increased business offered to the Phila. and Reading Railway Company at South Bethlehem, both by the Bethlehem Steel Company located at said town as well as by other industries in the vicinity. That the Phila. and Reading Railway Company is engaged in foreign and interstate commerce, as well as intrastate commerce, and was so engaged at the time of said accident.

That the cars handled by the said Phila. and Reading Railway Company on the tracks of the old yard before the work of enlarging said yard was begun and before said accident occurred, during the time of the work of enlarging said yard and at the time of the happening of said accident, and the cars handled in said yard since the completion of its said enlargement on December 31, 1912, have been cars hauling, carrying, bearing and engaged in both interstate and intrastate commerce."

Anthony Farrugia (Record, pp. 15-16):

"Q. Where was your gang of men working? Where were you and the gang of men under you working?

"A. Working on the gravel train.

"Q. What part of the Reading Railway were you working on?

"A. What day? The day of the accident, do you mean?

"Q. You were working in the South Bethlehem yards of the Philadelphia and Reading Railway Company, were you, at that time?

"A. All the time?

"Q. No, at the time of the accident you were working in the South Bethlehem yards of the Philadelphia and Reading Railway Company?

"A. Yes, Bethlehem Junction.

"Q. At Bethlehem Junction?

"A. Yes, that is what you call it.

"Q. You and your gang of men were digging and taking away dirt from the embankment, widening the yard of the Philadelphia and Reading Railway at that point? Is not that so?

"A. Yes, sir.

"Q. The dirt that you took from that embankment you and your men shoveled on these cars?

"A. Yes, shoveled it on the cars, yes.

"Q. And then the cars loaded with that dirt you took down to a point near or about the Hellertown station? That is true, is it not?

"A. Yes, sir.

"Q. And there you unloaded the dirt?

"A. Yes."

Louis Radai (Record, p. 40):

"Q. Were you a member of the section gang?

"A. Yes, sir.

"Q. And Farrugia was your foreman?

"A. Yes, sir.

"Q. Do you remember the day of the accident, August 12, 1909?

"A. Yes, sir.

"Q. Your gang was employed in carrying dirt from the excavation at South Bethlehem yards to a place about opposite the Hellertown station? Is not that so?

"A. Yes, sir."

Upon this proof, at the end of the plaintiff's case, the defendant moved for a nonsuit, and in granting this motion the learned trial Judge said (Record, p. 52):

> "THE COURT: Gentlemen of the jury, this action is brought under an Act which makes railroad companies which are interstate carriers liable for injuries to employees while engaged in interstate commerce. In this case there has been no evidence that the plaintiff was engaged in interstate commerce at the time of the accident. He was engaged in hauling dirt, with a gang of men, who were leveling some ground which was to be used to make additional tracks. Under the law as laid down by the Supreme Court that is not sufficient to make out an engagement by the plaintiff in interstate commerce. Consequently, it becomes my duty in the case to enter a nonsuit, and you are discharged from further consideration of the case."

The learned Court below, in filing the certificate of jurisdiction, declares that a nonsuit was entered (Record, p. 54):

> "On the sole ground that this Court could not take jurisdiction of the case and the jury could not be allowed to consider the case because the evidence produced at the said trial of the case did not disclose that plaintiff, at the

time of the happening of the accident by which he received the injuries complained of, was engaged in interstate commerce."

The question, therefore, flatly raised for the consideration of this Court, is whether employees of an interstate railroad company are performing a service in interstate commerce when employed in the work of excavating and leveling lands owned by the railroad company adjacent to a railroad yard for the purpose of permitting the construction in the future of additional tracks for yard use.

The work of excavation itself was not completed until two years after the plaintiff's injury, and the tracks thereon subsequently constructed were not available for use until more than three years subsequent to the day of the accident.

The tracks of the old yard were used before and after the accident in the business of the railroad for both interstate and intrastate service, and the increase in the yard facilities was made necessary by the increase in the business of the railroad at that point.

It would seem clear, however, that until the *additional* yard space was actually available for service and the character of the additional business defi-

nitely determined the management of the railroad company could not decide whether the additional tracks could best be used exclusively for the interstate business or exclusively for the intrastate business or jointly for the use of both interstate and intrastate business.

After the new construction was in operation the tracks thereon erected were, as a matter of fact, used jointly for interstate and intrastate business, but until devoted to this use they were not impressed with the character of instrumentalities engaged in commerce between the several states.

Even assuming that it was originally contemplated by the management of the railroad that the additional yard space, when in operation, would be devoted to interstate commerce, this determination was subject to change at any time, and, if the exigencies of the situation required it, the contrary conclusion might eventually have become the controlling one. Instead, therefore, of being put into both intrastate and interstate service, this addition to the yard at South Bethlehem could have been put exclusively into intrastate service without liability to the plaintiff or any other such employee.

It is submitted that plaintiff's contention can fairly be tested by considering the effect upon it of the time when his rights are determined. Unless the new construction of the addition to the defendant's yard was an instrumentality of interstate commerce at the time of the plaintiff's injury he can obtain no rights under the Federal statute merely because subsequent to the time of his injury the new construction in question became an instrumentality in interstate commerce.

The plaintiff brought three suits against the defendant company, for this same injury, two averring a common law right, and the third, which is the subject of this appeal, alleged to be based upon a right under the Federal statute.

The first suit was called for trial in the State Court of Pennsylvania on October 10, 1910, and a nonsuit was entered. The second suit under pleadings averring a common law right was tried in the Circuit Court for the Eastern District of Pennsylvania, April 20, 1911, and a nonsuit was entered.

The third suit, which is the case at bar, was tried in the District Court of the United States for the Eastern District of Pennsylvania, and a nonsuit was entered, on November 20th, 1913.

The record in this case shows that the new addition to the defendant's yard at South Bethlehem was not in operation or available as an instrumentality in either interstate or intrastate commerce until December 31, 1912.

It therefore follows that had the third suit been tried on the day that either the first or second suit was tried it would have been impossible to ascertain the character of service to which this yard was eventually to be put.

The summons in the case at bar issued December 10, 1910. The case was at issue and placed upon the trial list March 3, 1911. At that time the addition to the defendant's yard was not in service of any kind, and therefore the fact upon which the plaintiff's right to recover rests, to wit, the use of this yard after December 31, 1912, in interstate commerce, was neither ascertained nor ascertainable at the time when this case was at issue.

It would seem almost too absurd, to justify a serious argument, to contend that the right of the plaintiff to recover depends upon the date when his trial takes place, and yet that is the contention of the plaintiff in the case at bar. It was not until after December 31, 1912, almost two years after

the case at bar was at issue, that relevant testimony could be produced at the trial of the plaintiff's cause to establish the use of the addition to the defendant's yard upon the construction of which the plaintiff was working at the time of his injury.

The plaintiff, with his gang, carried the dirt which was taken from the land adjacent to South Bethlehem yard and dumped the same at various points more or less distant from the excavation. The dumping, being done at the time of his injury, was upon property belonging to a private corporation over which the defendant had no control, on the lands of which permission had been given to deposit the dirt taken from the South Bethlehem yard.

Counsel for the plaintiff in error has argued that because upon this dirt, after it was dumped upon the Thomas Iron Company's property, a side track was constructed or the old side track was eventually moved, over either of which, interstate commerce may have been carried by the Thomas Iron Company, this fact also should be taken into consideration in determining the character of the employment of the plaintiff in error by the defendant railway company.

It is obvious that, as contended for by counsel for

the defendant in error at the trial, the use to which the Thomas Iron Company put its property before or after the accident has no bearing in determining the relationship existing between the plaintiff in error and the defendant in error. The only relation which the use of the Thomas Iron Company's land bears to the facts in this case is merely to indicate the place at which the dirt was dumped, and to eliminate the possible inference that it was being carried by the plaintiff in error to a place for use by the defendant railway on its property in its service in repairing a road-bed used in interstate commerce. That this was not the use to which it was put is disclosed by the proof that the dirt was dumped upon the lands of the Iron Company.

The statement of counsel for the plaintiff in error is misleading (Brief of Plaintiff in Error, p. 8), where he says:

> "There the dirt was being dumped, or about to be dumped, at the time plaintiff in error met with his accident, in order to afford additional and required road-bed for a side track alongside of defendant in error's through tracks, and over which side track interstate commerce passed every day from defendant in error's road. Some times and on previous occasions the excavated dirt had been dumped at other

places alongside defendant in error's right of way, but on this particular occasion it was dumped at this special spot. * * *

"Whether the dumping of dirt alongside a track which already carries interstate commerce, in order to afford additional road-bed and support for it, is 'repair' or 'construction,' is a debatable question. Plaintiff in error submits that under the circumstances of this case it partakes more of the nature of 'repair' than 'construction.' "

The way in which this statement is put would naturally lead this Court to infer that the track referred to was a track of the defendant railway company, whereas the dumping ground was not railroad property, as heretofore stated. This is disclosed not only by the oral testimony of the witnesses, but by the stipulation of counsel (Record, p. 8):

"That the dirt upon the cars of the train upon which plaintiff was engaged at the time of the accident was subsequently unloaded upon the property of the Thomas Iron Company, at Hellertown, Pennsylvania, which is a suburb of South Bethlehem, said dirt being so unloaded because of a request so to do made by the said Thomas Iron Company to the said Phila. and Reading Railway Company. Said property of the Thomas Iron Company was adjacent to and connected with the property of

> the Phila. and Reading Railway Company; and said dirt was so unloaded for the purpose of building and affording additional road-bed and right of way for the construction and extension of sidings and side tracks by the said Thomas Iron Company upon its said adjacent property. These said sidings and side tracks are directly connected with the main tracks of the Phila. and Reading Railway Company, from which main tracks all of the trains and cars of the said Thomas Iron Company run and are propelled onto the said sidings and tracks of the said Thomas Iron Company, carrying commerce of the said Thomas Iron Company."

The test therefore of the character of the service of the plaintiff in error is the work in which he was engaged *at the time of his injury*. The record shows that this service had no relation whatsoever to the interstate business of the defendant railway company at the time of the accident. The plaintiff in error was aiding in the excavation and leveling of lands owned by the railway company, and upon this land, more than three years thereafter, tracks and sidings were constructed and in use in the business of transportation. At the time of the plaintiff's injury, however, no such use was impressed upon this land and his service was therefore not a service

in interstate commerce in any sense that these words can be used.

In all of the cases cited by the plaintiff in error the labor in which the employee was engaged at the time of his injury was concerning an instrumentality already impressed with interstate service.

In **Lamphere v. Oregon Railway &c. Co.**, 196 Federal Repr. 336, the train in the movement of which the employee was engaged contained cars carrying interstate commerce, while in **St. Louis &c. Railway Co. v. Seale**, 229 U. S. 156, the injured employee was actually engaged in making a record of cars containing interstate commerce at the time he was hurt.

Pederson v. Delaware &c. Railway Co. (supra), **Zikos v. Oregon Railway &c. Co.** 179 Fed. Repr. 893, and **Central Railway Co. v. Colasurdo**, 192 Fed. Repr. 901, all show that the work of repair in which the employee was engaged at the time of his injury, was upon tracks, or bridges, already devoted either exclusively or partly to the service of interstate transportation.

Norfolk & Western R. R. Co. v. Ernest, 229 U. S. 114, was decision in favor of an employee actually in charge of the movement of a locomotive

proceeding to the point where it was to be attached to cars carrying interstate shipments, and in the late case of **North Carolina R. R. Co. v. Zachary,** United States Supreme Court, No. 144, October term, 1913, decided February 2, 1914, in which the opinion was delivered by Mr. Justice Pitney, the employee was held to be engaged in interstate commerce because his service had actually commenced and his engine, which was waiting for him, was assigned to the service of transporting a train containing cars loaded with interstate freight which had come from another State and were to be moved afterward to their destination by the engine of which the deceased employee was fireman, and upon which he had been working prior to his injury.

The case more closely approaching the contention of the plaintiff in error than any other is **Law v. Illinois Central R. R. Co.,** 208 Fed. Repr. 869, not cited by the plaintiff in error in his brief. The United States Circuit Court of Appeals for the Sixth Circuit by an opinion by Knappen, Circuit J., held that a boilermaker's helper employed in the shops of a railroad company injured while assisting in the repair of an engine regularly in use in interstate commerce, but temporarily in the shops for re-

pairs, where it had been for twenty-one days and was returned to use two days later, was employed in interstate commerce at the time of his injury.

It is submitted that this decision carries the effect of the Federal Employers' Liability Act far beyond its original scope and intention, and that the use by Judge Knappen of the decision in **Pederson v. Railway Company** to support his conclusion is a strained extension of the opinion of Mr. Justice Van Devanter in that case.

Even if the case of **Law v. Railroad Company** is well considered and may be affirmed by this Court when it is reached in due course, as an authority in the case at bar for the plaintiff's position it fails to go sufficiently far to meet his contention.

In the **Law** case the engine upon which the work was being done at the time of the plaintiff's injury had been in interstate service and was intended for interstate service after the temporary repairs were completed. Whether the Court rightly concluded that during the time for repairs, when it was out of service as an instrumentality of transportation, because of the use subsequently made of it, it was not withdrawn from interstate service, may be the subject of argument and differing opin-

ions. That it had been impressed, however, with an interstate use is a fact, and it is this fact which presents the clear distinction between that case and the case at bar. If the engine on which the plaintiff was working in the **Law** case had never been in service but was in the process of construction, the decision in that case would apparently have been to the contrary.

In the case at bar the excavation work in which the plaintiff was engaged at the time of his injury had not yet reached the point where the tracks were in place, much less in service for interstate movements.

The learned Court below in granting the nonsuit was influenced in his decision by the language used in the opinion of Mr. Justice Van Devanter, in **Pederson v. Delaware &c. Railroad Co.** (supra), where he said (p. 650):

> "Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such intrumentalities and during their use as such."

It would seem reasonably clear from that language, as well as from other decisions of this Court, that the judgment of nonsuit was rightly entered, because until the new construction was in actual service there was no way known to the law to prove the character of the use to which it might subsequently be put. The fact that more than three years after the accident the new construction was made available for interstate transportation cannot be related back to the time of the plaintiff's injury to enable him to establish the proper basis for his cause of action.

It is respectfully submitted that the judgment of the District Court of the United States for the Eastern District of Pennsylvania should be affirmed.

WM. CLARKE MASON,
CHARLES HEEBNER,
Counsel for Defendant in Error.

Office Supreme Court, U. S.
FILED 20
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JAMES D. MAHER
CLERK

No. 823. October Term, 1913.

IN THE

Supreme Court of the United States.

ANTHONY FARRUGIA,

Plaintiff in Error and Plaintiff Below,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania,

Defendant in Error and Defendant Below.

Writ of Error to District Court of the United States for the Eastern District of Pennsylvania.

MOTION TO ADVANCE.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

International, 236 Chestnut St.

IN THE

Supreme Court of the United States.

October Term, 1913. No. 823.

ANTHONY FARRUGIA,

Plaintiff in Error and Plaintiff Below,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, A CORPORATION OF THE STATE OF PENNSYLVANIA,

Defendant in Error and Defendant Below.

WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

To the Honorable the Justices of the Supreme Court of the United States:

The plaintiff in error, Anthony Farrugia, hereby respectfuly shows:

1. That on or about December 10, 1910, plaintiff in error began a suit at law in the District Court of the United States for the Eastern District of Pennsylvania, against the Philadelphia and Reading Railway Company, the defendant in error, to recover damages

for serious personal injuries sustained by said plaintiff in error.

2. Said suit was of October Sessions, 1910, No. 1210, and was brought under the Acts of Congress known as the Railroad Employers' Liability Acts, approved April 22, 1908, and April 5, 1910.

3. The facts upon which said suit was brought, as shown by the statement of claim and as developed at the trial, are briefly as follows:

Plaintiff in error was employed by defendant in error on August 12, 1909, as the foreman of a gang of section men or laborers. On said date this gang of men was engaged in removing dirt, loading it on cars, carrying it away and dumping it, for the purpose of enlarging the space and leveling the ground so that defendant in error could thereby lay and construct more tracks and consequently enlarge and increase the facilities of its yard located at South Bethlehem, Pennsylvania. All of this enlargement and increase was subsequently accomplished.

On one of the trips of this work train in order to dump the dirt, at a spot which was unfamiliar, without any specific warning, in the course of his duties, plaintiff in error came in contact with a pole placed in too close proximity to the track, was knocked from his position, fell under the train and lost his leg.

4. At the trial of the cause on November 19 and 20, 1913, the evidence showed that defendant in error was engaged in interstate commerce both before, at the time of, and since the occurrence of which plaintiff in error complains, and that the railroad yard, which plaintiff in error was engaged in enlarging, was used for the handling and storage of cars carrying interstate commerce before, at the time of, and since said accident. The learned trial judge, however, held and

decided that plaintiff in error was not engaged in interstate commerce at the time he received his injuries, and refused to entertain the action or allow the jury to render a verdict.

5. It developed at the trial that both plaintiff in error and defendant in error were citizens of the State of Pennsylvania, and that the sole ground of the jurisdiction of said District Court was that said action was brought under the Acts of Congress of 1908 and 1910. Said District Court therefore refused to entertain jurisdiction of said suit by holding that plaintiff in error was not engaged in interstate commerce at the time he met with his accident and that said Acts did not apply.

6. Plaintiff in error took out a writ of error from this judgment of the District Court to the Supreme Court of the United States, and had said District Court judge certify said question of jurisdiction to this court.

Plaintiff in error, through his attorney, George Demming, Esq., comes now, therefore, this, the fifth day of January, 1914, and asks this court to advance for argument to such early date as may be convenient to the court, in accordance with Rule No. 32, the case of Anthony Farrugia, plaintiff in error, vs. Philadelphia and Reading Railway Company, defendant in error.

GEORGE DEMMING,
Attorney for Anthony Farrugia,
Plaintiff in Error.

FARRUGIA *v.* PHILADELPHIA & READING RAILWAY COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 823. Argued March 2, 1914.—Decided April 13, 1914.

The provision in § 238, Judicial Code, providing for a direct writ of error in any case in which the jurisdiction of the court is in issue, refers to cases in which the power of the court, as a Federal court, to hear and determine the cause is in controversy.

Where that power is not in question, but only the sufficiency of the evidence to establish an element of the plaintiff's asserted cause of action, § 238, Judicial Code, does not apply and the writ of error must be dismissed.

A decision of the District Court of the United States granting a compulsory non-suit in an action brought under the Employers' Liability Act because the evidence did not show that the plaintiff was engaged in interstate commerce, is subject to review in the Circuit Court of Appeals. A direct writ of error to this court under § 238, Judicial Code, will not lie as the jurisdiction of the court as a Federal court is not in issue.

THE facts, which involve the construction and application of the Employers' Liability Act, and the jurisdiction of this court of a direct appeal from the District Court under the Judicial Code, are stated in the opinion.

Mr. George Demming for plaintiff in error.

Mr. William Clarke Mason, with whom *Mr. Charles Heebner* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action against a railway company to recover for personal injuries. The right of action was predicated upon the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291, and it was alleged that the injuries were sustained while the defendant was engaged, and while the plaintiff was employed by it, in interstate commerce. There was a plea of not guilty, and a trial resulted in a judgment of compulsory non-suit. The case is here upon a direct writ of error based upon a certificate that the court's decision was given upon a jurisdictional ground, namely, that "the evidence produced at the said trial of the case did not disclose that plaintiff, at the time of the happening of the accident by which he received the injuries complained of, was engaged in interstate commerce."

Although counsel have presented the case as if it were properly here, it is manifest that it is not. The clause in § 238 of the Judicial Code providing for a direct writ of error "in any case in which the jurisdiction of the court is in issue" refers, as we have repeatedly held, to cases in which the power of the court, as a Federal court, to hear and determine the cause is in controversy. *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175, 178; *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Darnell* v. *Illinois Central Railroad Co.*, 225 U. S. 243. No such issue is here disclosed. The power of the court, as a Federal court, to hear and determine the case was not questioned. Nor did the court hold that it was without jurisdiction

in that sense. On the contrary, it proceeded to a hearing and decided that the plaintiff could not recover under the Federal act, because one element of his asserted cause of action was without any evidence to sustain it. Had the action been brought in a state court, as it could have been, the same question would have arisen, and had the evidence been similarly insufficient a like decision must have ensued. We say the action could have been brought in a state court, because § 6 of the Federal act declares: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." And we say the result must have been the same in a state court upon similar evidence, because the right of recovery given by the act (§ 1) is restricted to injuries suffered while the employé is employed in interstate commerce.

It follows that there was no basis for the direct writ of error. If a review of the decision was desired it should have been sought in the Circuit Court of Appeals.

Writ of error dismissed.